

(22,362)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 153.

NORFOLK AND WESTERN RAILWAY COMPANY,  
PLAINTIFF IN ERROR,

vs.

D. E. EARNEST.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF VIRGINIA.

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1 *Transcript of Record.*

UNITED STATES OF AMERICA,  
Western District of Virginia, ss:

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff in Error,  
vs.  
D. E. EARNEST, Defendant in Error.

Trespass on the Case.

Pleas Before the Honorable Judge of the Circuit Court of the United States for the Western District of Virginia and Fourth Circuit, at Roanoke, in and for said District and Circuit, at the June Term, 1910.

Be it remembered that heretofore, to-wit:

2 In the Circuit Court of the United States for the Western District of Virginia, at Roanoke, Virginia, Second January Rules, 1910.

At Law. No. —.

D. E. EARNEST, Plaintiff,  
v.  
NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

Trespass on the Case.

*Declaration.*

David E. Earnest, a citizen and inhabitant of the Western Judicial District of Virginia, complains of the Norfolk & Western Railway Company, a corporation under the laws of the State of Virginia, being an inhabitant, citizen and resident of the said Western Judicial District of Virginia, having its principal office and place of business at Roanoke, Va., in said Judicial district, of a plea of trespass on the case for this, to wit:

That on, to wit: the 13th day of February, nineteen hundred and nine, and for a long time prior thereto, the defendant was, had been, and continued to own, control and operate a certain interstate railroad, extending from Columbus, Ohio, through Ohio and to and through the states of West Virginia and Virginia, to Norfolk, Virginia and to and through Virginia and the state of Maryland to Hagerstown in said state of Maryland, and to and through other States of the United States; that at said time and places it owned and operated upon said railroad sundry cars and engines driven and pro-

- 3       pelled by steam and was then and there a common carrier by railroad for hire, engaged in maintaining and operating said railroad as such common carrier of passengers and merchandise between and among said several states of Ohio, West Virginia, Virginia, Maryland and other states, and was then engaged in trade and commerce in, through and between said states, and was using said railroad, cars and engines as the instruments of said commerce, to wit: in the transportation of passengers and merchandise from state to state, as aforesaid; that on the day and year aforesaid, the plaintiff was and for a long time prior thereto had been in the employment of the defendant in the capacity of a fireman on sundry of said engines used in hauling said cars, which engines and cars had for a long time prior to the happening of the grievances herein mentioned and at the time thereof were engaged in the commerce aforesaid; that as such fireman and employee, plaintiff was subject to the orders of the defendant, and on the aforesaid day and year the plaintiff was and for a long time prior thereto had regularly been assigned to duty as a fireman on a certain locomotive engine and engines, engaged in said commerce as aforesaid, at Northfork in the State of West Virginia, it being the duty of plaintiff, together with an engineman or engineer, both acting under the orders and instruction of the defendant to operate said engine and engines at the time of the grievances hereinafter mentioned; the said engine and engines, being what is known as "Pusher Engines" and plaintiff's duty being known as "Pusher Service" and said engine and engines on which plaintiff was directed and ordered to work were assigned to the duty of pushing defendant's trains going east over a certain grade
- 4       extending from a point on said Interstate Railway at or near Northfork in the State of West Virginia, easterly a distance of, to wit: fifteen miles, and sometimes to assist in pushing said trains from said Northfork, West Virginia, into and through a portion of Virginia, and back into West Virginia at Bluefield, that all of the trains that said engine and engines upon which plaintiff and said Engineer worked, and that were assisted over said grade, were interstate trains, to wit: carrying cars and freight and passengers from the State of Ohio, West Virginia and other states to and through the states of West Virginia, Virginia, Maryland and other states, and foreign countries; that when said locomotive engine and engines on which plaintiff was ordered by the defendant to work, **were not actually engaged in pushing trains as aforesaid**, they had been for a long time and were on the date of the grievance herein mentioned, regularly kept in defendant's railroad yard at the said station of Northfork, West Virginia; that whenever said engine, or engines, was or were taken from defendant's main or through tracks into said yard, or brought out of said yard on to said main or through tracks, it was necessary for said engine or engines engaged in said pusher service, to pass over a number of switches, and that, when **said engine or engines engaged in said pusher service were being taken into or out of said yard as aforesaid**, it was a part of plaintiff's duty, as fireman of said engine, to walk before the same and examine the said switches and see that they were properly set and to signal

to the engineer in charge of said engine or engines to proceed, and that when said engine or engines were being taken into or brought

out of said yard, as aforesaid, it was the duty of the engineer  
5 in charge of any such engine not to pass over any switch until signalled by the plaintiff to do so and to keep his engine

under such control as not to run over plaintiff while he was so engaged in piloting said engine or engines and adjusting said switches; that on the day and year aforesaid, to wit: on February 13, 1909, about eleven O'clock P. M., the defendant, through its officers and agents, ordered the plaintiff to report for duty as fireman on one of said engines engaged in the pusher service aforesaid, at said Northfork, West Virginia, which engine was then standing in the aforesaid yard, and plaintiff was ordered, as aforesaid, to put said engine in readiness to engage in said pusher service and to push over the aforesaid grade one of defendant's said interstate trains, which was then approaching the said station at Northfork, said train being enroute from points outside of the state of West Virginia and from points in West Virginia, bound through West Virginia and to points in Virginia: to wit: from Columbus, Ohio and from Williamson, West Virginia and through a portion of the state of Virginia and to Bluefield, West Virginia and to other points in the states of West Virginia and Virginia; that the defendant was then engaged in transporting goods, wares and merchandise in and upon the cars composing said train and the other trains that plaintiff was ordered to push over said grade, which goods, wares and merchandise were being shipped from Ohio, West Virginia and other states to and through Virginia and other states; that in compliance with said orders from the defendant, plaintiff had reported for duty on said engine, and as said engine was being brought out of said yard for the purpose of pushing the aforesaid train and other trains engaged in interstate commerce be-

6 tween the states of Ohio, West Virginia and Virginia and other states, the plaintiff in carrying out said orders of the defendant and in the discharge of the duties imposed upon him by said defendant and in the exercise of due care was walking ahead of said engine and examining and when necessary adjusting and placing the switches over which said engine had to pass to get out of said yard on to defendant's main or through tracks and when said switches were properly set, was giving the necessary signals to the engineer in charge of said engine to proceed, all of which it was plaintiff's duty to do.

And the Plaintiff Avers that it then and there became and was the duty of the defendant to have the said railroad tracks in said yard in such a state of repair, and to have the said railroad yard so lighted that the plaintiff could safely proceed along the said tracks ahead of said engine in the performance of the aforesaid duty of piloting said engine out of the said yard in the manner aforesaid; and it then and there became the further duty of the defendant, through its agent and employee, the engineer in charge of said engine, to keep a careful lookout for the plaintiff, and not to run said engine over any switch until signalled by the plaintiff to do so and not to run said engine against or over the plaintiff and to so

operate the said engine as not to injure the plaintiff while he was engaged in the aforesaid duty of piloting the said engine out of the said yard in the manner aforesaid. But the plaintiff avers that in violation of its duty in the premises and in disregard of the rights of the plaintiff, the defendant carelessly and negligently failed to keep the said tracks in good and safe repair, in that said tracks contained

7 many deep holes and carelessly and negligently failed to have the aforesaid yard and tracks properly lighted at the time aforesaid; and that the defendant, through its agent and employee, the engineer in charge of the aforesaid engine, did negligently and carelessly fail to keep a proper lookout for the plaintiff and for his signals as it was his duty to do, and did negligently and carelessly operate said engine, in that, just as the plaintiff had approached a certain switch, to wit: the switch which connected what is known as track number two to the track known as the "spark" track in said yard, and before plaintiff had examined the same or had signalled to the said engineer, the said engineer without waiting for and receiving said signal carelessly and negligently, with great force and violence, ran said engine over said switch and in doing so struck and ran said engine over the plaintiff, inflicting upon him great bodily injuries; so that in consequence of all of the negligence and carelessness of the defendant as aforesaid and of its said engineer as aforesaid, and because of no negligence or want of care on the part of the plaintiff, the plaintiff while engaged in the performance of his duty as aforesaid was struck and run over by the aforesaid engine, whereby and in consequence of all of said negligence and carelessness of the defendant aforesaid, the plaintiff was greatly bruised and sustained serious and permanent external and internal injuries and had one of his legs severed from his body and the foot of the other leg bruised crushed and lacerated, resulting in the amputation of one of his legs and from which injuries aforesaid and amputation aforesaid, he became sick, sore and lame, and was compelled to remain in a hospital under treatment for a long space of time, to wit:

8 one month, and was afterwards compelled to remain in doors and under treatment for a long space of time, to wit: six months, and from which injuries and said amputation he has, from the day of said injuries to the present time continued to suffer great pain of body and anguish of mind, and from the nature thereof will, during the rest of his life continue to suffer said bodily pain and anguish of mind and humiliation on account of the loss of said limb, and from the day of said injury to the present time he has lost earnings he would otherwise have received and will necessarily continue to be incapacitated during the rest of his life for the performance of severe manual labor, such as he was before enabled to perform and consequently has been since the day of said injuries and will be during the rest of his life, prevented from earning such salary or wages as he was enabled to earn before he was injured as aforesaid; that the loss of said leg, as aforesaid, has utterly disabled him for life from earning a livelihood.

Wherefor, the said plaintiff says that by reason of the premises he hath sustained damages to the amount of Twenty Thousand Dol-

lars (\$20,000.00), and that by virtue of the Act of Congress, approved April 22nd, 1908 entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases" an action has accrued to the plaintiff against the defendant, and therefore he brings this suit.

PACK, HINTON, PACK,  
THOS. L. MOORE, P. Q.

Dec. 31, 1909.

9        Endorsed: David E. Earnest vs. N. & W. R. R. Co., Declaration in Trespass on the Case. Filed January 4, 1910. S. W. Martin, Clerk.

*Summons.*

UNITED STATES OF AMERICA,  
*Western District of Virginia, ss:*

To the Marshal of the Western District of Virginia, or to any of his Deputies, Greeting:

We command you to summon Norfolk and Western Railway Company, a Corporation if to be found in your District, to be and appear at the Clerk's Office of the Circuit Court of the United States for the Western District of Virginia, at Rules to be holden at Roanoke, in the District aforesaid, on the 3rd Monday of January, 1910, to answer David E. Earnest of a plea of Trespass on the Case; Damages \$20,000.00.

And this you will in no wise omit, under the penalty of the law in that case made and provided, and have you then and there this writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Roanoke, this the 30 day of Dec. in the year of our Lord one thousand nine hundred and 9 and of our Independence the 134 year.

[SEAL OF THE COURT.]

STANLEY W. MARTIN,  
*Clerk United States Circuit Court.*

10        Endorsed: Dav'd E. Earnest vs. Norfolk & Western Railway Co. a Corporation. Summons. Returnable Roanoke, Va. 3rd. Monday in January, 1910.

Received the within summons at Roanoke, Va. on Jan. 1 1910, and executed the same on the Norfolk & Western Railway Company, at Roanoke, Va. by delivering to J. B. Lacey, treasurer of the defendant Company, at Roanoke, Va. where said Lacey resides and has his place of business and where said Company resides and has its principal office and place of business, a true copy of the within writ, on this January 3rd, 1910.

S. BROWN ALLEN,  
*U. S. Marshal,*  
My J. P. BURNETT,  
*Deputy Marshal.*

Fee \$2.00 paid.

*Court Order Feb'y 14, 1910.*

And again:—

At a Regular Term of the Circuit Court of the United States for the Western District of Virginia and Fourth Circuit, Continued and Held at Roanoke, in and for said District and Circuit, on February 14th, 1910.

Hon. Henry C. McDowell, District Judge.

DAVID E. EARNEST, Plaintiff,

VS.

N. & W. R. R. Co., Defendant.

*Trespass on the Case.*

On motion of the plaintiff, and support of which he files the necessary affidavit, from which it appears that there is in the possession of D. E. Spangler, Superintendent of Transportation of the Norfolk & Western Railway Company, at Roanoke, Va., and J. R. Talbott, Car Accountant of the said Norfolk & Western Railway Company, at Roanoke, Virginia, an original record showing the movement and the consist of trains and the origin and the destination of cars composing the same, hauled over the defendant's railroad in an easterly direction from Northfork, West Virginia, towards Bluefield, West Virginia, and that were assisted up the grade or grades between Northfork and Bluefield by the "helper engine" or engines engaged in the "helper" or "pusher service," and upon which engine or engines said D. E. Earnest, plaintiff, worked as a fireman or other servant or employee of the defendant; the said record covering a period of time from January 1, 1909 to February 15, 1909; that said record of the movement of said trains and the consist thereof and the origin and destination of said cars composing trains that it is alleged the plaintiff assisted over the road of the defendant, is material to the plaintiff as tending to prove that at the time he was injured as set out in the declaration, the defendant was a common carrier by railroad engaged in commerce between the States and that the plaintiff was in its employment assisting it in such commerce;

It is ordered, that the Clerk of this Court forthwith issue subpoenas duces tecum in due form, commanding the said D. E. Spangler and J. R. Talbott to appear before this Court at Roanoke, Virginia, on February 23, 1910, to testify generally in this case and to produce the record or records above described as being in their possession.



*Affidavit for Subpœna Duces Tecum.*

In the Circuit Court of the United States for the Western District of Virginia, at Roanoke, Virginia.

D. E. EARNEST

v.

NORFOLK & WESTERN RAILWAY COMPANY.

*Affidavit for Subpœna Duces Tecum.*

12 I, Thomas L. Moore, agent for D. E. Earnest, make oath upon information and belief that there is now in the possession and under the control of D. E. Spangler, Superintendent of Transportation of the Norfolk & Western Railway Company, at Roanoke, Virginia, and J. R. Talbott, Car Accountant of the said Norfolk & Western Railway Company, at Roanoke, Virginia, an original record showing the movement and the consist of trains and the origin and destination of the cars composing the same, hauled over the defendant's railroad in an easterly direction from Northfork, West Virginia towards Bluefield, West Virginia, and that were assisted up the grade or grades between Northfork and Bluefield by the "Helper" engine or engines engaged in the "helper" or "pusher" service, and upon which engine or engines said D. E. Earnest, plaintiff, worked as a fireman or other servant or employé of the defendant; that said record covers a period of time from January 1, 1909, to February 15, 1909; that said record of the movement of said trains and the consist thereof and the origin and destination of said cars composing said trains that it is alleged the plaintiff assisted over the road of the defendant, is material to the plaintiff in tending to prove that at the time he was injured as set out in the declaration, the defendant was a common carrier by railroad engaged in commerce between the States and that the plaintiff was in its employment assisting it in such commerce.

Given under my hand this the 12 day of February, 1910.

THOS. L. MOORE.

Subscribed and sworn to before me at Roanoke, Virginia, this the 12 day of February, 1910.

W. BRUCE BUFORD.

*Deputy Clerk, U. S. Circuit Court, Western Dist. of Va.*

13

*Demurrer.*

In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST

v.

NORFOLK AND WESTERN RAILWAY COMPANY.

And the said Defendant demurs to the said declaration, and to each count thereof, and to each breach thereof, and saith that the said declaration and each count thereof, and each breach thereof, are not sufficient in law. And for grounds of demurrer, the said defendant assigns the following:—

I.

The declaration relies on the Act of Congress approved April 22, 1908, and entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," as creating a liability on the part of the defendant to the plaintiff. The said act is void for the following reasons:—

*a.* The act is not a regulation of commerce, or of commerce between the states.

*b.* The act is unconstitutional in declaring a rule of liability for "Every common carrier by railroad, while engaged in" inter-state commerce in favor of "any person suffering injury while he is employed by such carrier," in interstate commerce different from the rule of liability applied to employees similarly engaged, 14 of other persons or corporations and applies to all employees without regard to the hazard of their work. The act is in violation of the fifth amendment of the constitution of the United States being an arbitrary imposition of liability without regard to the hazard of the business.

*c.* The act is unconstitutional as beyond the federal power because it makes the carrier liable for the negligence of the intrastate employee.

*d.* The act is unconstitutional, Section 5 thereof being void for the following reasons:—

1. The section is not a regulation of interstate commerce, and prescribes no rule by which either traffic, transportation or commerce is regulated:

2. The section is class legislation:

3. The section is an unwarrantable interference with the liberty of contract protected by the fifth amendment to the constitution of the United States.

*e.* The act is void because it imposes duties upon, and gives privileges to, personal representatives not given or imposed by the laws of the States, appointing them and by whom they are controlled, and is further void because it is an infringement upon the right of the

state to enact its own laws with respect to the devolution and distribution of estates of deceased persons.

## II.

The declaration improperly charges duties of insurance which are higher duties than are imposed by law and owing to the plaintiff by the defendant.

## III.

The declaration alleges no facts showing that the alleged negligence of the defendant was the proximate cause of the injury to the plaintiff.

## IV.

The declaration alleges that the defendant was negligent in  
15 several particulars, only one of which had any connection with the injury to the plaintiff, and attributes the accident to the cumulative effect of all as the proximate cause of the accident. Thus the duty alleged to be owing from the defendant, and the acts of negligence relied upon are not stated with sufficient particularity and clearness.

Endorsed: D. E. Earnest, vs. Norfolk & Western Railway Company. Demurrer. Filed Feb. 22, 1910, Stanley W. Martin, Clerk.

### *Opinion on Demurrer.*

D. E. EARNEST

v.

NORFOLK & WESTERN RAILWAY CO.

### *Opinion on Demurrer.*

(1) In Walsh v. R. Co., 173 Fed. 494, Judge Lowell said: "The defendant's first ground of demurrer is the alleged unconstitutionality of the statute (Employer's Liability Act of April 22, 1908) as a whole. Without reasoning the question thus raised, this court may well leave it for the decision of a higher court, and may formally hold that the first section of the act is constitutional. With this result agrees the only decided case. Watson v. R. Co., 169 Fed. 942." This seems to me to be the proper position for this court to take in this case; especially so in view of the probable pecuniary inability of the plaintiff to prosecute writ of error, were this court to hold the statute unconstitutional.

Assuming the constitutionality of the Act, it has been of some interest to me to enquire if the plaintiff at the time of the injury was employed in interstate commerce. While this point does not seem to be set out in the written grounds of demurrer, it should nevertheless be considered as it goes to the jurisdiction of the court in this case.

The plaintiff was fireman of a "pusher" engine, which was used in

assisting interstate trains up a grade. When not engaged this engine was kept in the yard at Northfork. On the occasion in question—

the engine being in the yard—the plaintiff was required to  
 16 pilot the engine from the place where it was standing to the main track in order to couple to an interstate train, then approaching. Had the injury occurred after the pusher engine had been actually coupled to the interstate train, I suppose there would be no question but that plaintiff was then employed in interstate commerce. But it may be argued that in performing the preliminary or preparation service stated in the declaration the plaintiff was not employed in interstate commerce. The following causes have some slight tendency to support such contention: *Weisel v. R. Co.* (Minn.) 31 N. W. 756; *Jemming v. R. C. P.* (Minn.) 104 N. W. 1079; *Dunn v. R. Co.* (Iowa) 107 N. W. 616; *M. K. & T. R. Co. v. Medaris* (Kansas) 55 Pac 875; *Reddington v. R. Co.* (Iowa) 98 N. W. 800. But the pusher engine was at the time in question an instrumentality of interstate commerce. If the service being rendered by the plaintiff at the time of the injury had not been rendered by some one, the then approaching interstate train would have been impeded or halted in its journey. If under the facts stated in *Johnson v. R. Co.*, 196 U. S. 1, 21, 22, the dining car there was being used in interstate commerce, it seems to necessarily follow that the pusher engine here was being used in such commerce, and if so then the plaintiff was at the time of the injury employed in interstate commerce. See also the decision in *McCall v. California*, 136 U. S. 104, 108, 111 (holding that an agent in California, who did not sell tickets, but merely solicited passengers from Chicago to New York to travel by a particular road was engaged in interstate commerce); *State of Wisconsin v. C. M. & St. P. R. Co.*, — *Wisc.* — (relating to train dispatcher); *State of Texas v. T. & N. O. R. Co.*, — *Tex. Civ. App.* —, (relating to railroad telegraphers); *U. S. v. A. T. & S. F. R. Co.*, — *Fed.* — (under Hours of Service Act), and *Union Stock Yards Co. v. U. S.*, — *Fed.* — (holding a stock yard company subject to Safety Appliance Act). In *Hoxie v. R. Co.*, — *Conn.* — it is said that “a waitress employed by an interstate railroad in a railroad restaurant, where local custom does not exist or is  
 17 not served, could recover on the statute for an injury received from the negligence of a man hired by the carrier for some purpose purely of a local character.” Assuredly if a waitress is “employed in interstate commerce”, the plaintiff in the case at bar was at the time of his injury so employed.

(2) The second ground of demurrer is that the declaration charges a higher duty than is imposed by law. The duty of the master to his employee, under the circumstances here, is to use ordinary, and not extraordinary, care. Under the federal Employer's Liability Act the fellow servant doctrine is abolished and hence the engineer in the case at bar is to be treated as a vice principal. But if so treated his duty towards the plaintiff can not be higher than that of the master. The duty of the master being to use ordinary care, it seems to follow that the duty of the master's alter ego is also only to

use ordinary care. In this respect I think the demurrer well taken; but the declaration can be amended.

(3) The third ground of demurrer does not seem to me to be sound. The alleged act of the engineer in going forward without waiting for plaintiff's signal, was to my mind the proximate cause of the injury, and this seems to be well charged.

(4) The last ground of demurrer is that the declaration alleges the existence of two duties (in respect to repair of road-bed and lighting the yard), the breaches of which are not proximate causes of the injury and charges the injury to have been the result of breaches of these two duties as well as of the breach of duty by the engineer. So far as can be learned from the declaration the injury was not caused even remotely by the condition of the road-bed or by reason of the failure to light the yard. While the pleader alleges, as a conclusion, that all three of these breaches of duty caused the injury; no fact is alleged which leads to such conclusion. To allege the existence of, and to charge the breach of, duties, which did not cause the injury, would seem to be bad pleading. Every thing that is rightly alleged in a declaration ought to be provable. To prove that the defendant here was negligent in respect to the condition of its road-

bed and as to lighting the yard, although neither fact caused 18 or contributed to the accident, would confuse, and very probably unfairly prejudice the jury.

If in fact the injury was caused in part by the failure of the defendant to properly light the yard for instance, the declaration should so allege. (And in such event, under *R. Co. v. Taylor*, 109 Va. 737, and 26 Cyc. 1390, it should be further alleged that defendant knew or should in the exercise of ordinary care have known of the conditions.) But if the injury was caused solely by the want of ordinary care on the part of the engineer, it seems to me that the allegation as to the road-bed and lights should be stricken out. See 29 Cyc. 573; *R. Co. v. Steegal*, 105 Va. 538, 543.

It follows that the demurrer must be sustained with leave to amend.

Endorsed: D. E. Earnest vs. N. & W. R. Co. Opinion. Filed Feb'y. 28, 1910. Stanley W. Martin, Clerk.

#### *Order.*

In the United States Circuit Court for the Western District of Virginia, Continued and Held at Roanoke, in and for said District, on February 28, 1910.

D. E. EARNEST.

v.

NORFOLK & WESTERN R. CO.

This day came the parties by their attorneys, and defendant's demurrer to the declaration having been joined in by plaintiff, and the grounds of demurrer in writing filed February 22, 1910, having been argued by counsel.

It is considered by the court, for reasons set out in a written opinion this day filed, that said demurrer be and it is sustained. But plaintiff is allowed, if he so elect, until the second March Rules 1910, to file an amended declaration.

Endorsed: Earnest v. N. & W. Rwy. Co. Order. February 28, 1910. Enter: Henry C. McDowell, District Judge. Filed March 2, 1910. S. W. Martin, Clerk.

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*Amended Declaration.*

In the Circuit Court of the United States for the Western District of Virginia, Second March Rules, 1910, at Roanoke, Virginia.

At Law. No. —.

D. E. EARNEST, Plaintiff,

v.

NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

Trespass on the Case.

*Amended Declaration.*

David E. Earnest, a citizen and inhabitant of the Western Judicial District of Virginia, complains of the Norfolk & Western Railway Company, a corporation under the laws of the State of Virginia, being an inhabitant, citizen and resident of the said Western Judicial District of Virginia, having its principal office and place of business at Roanoke, Va., in said judicial district, of a plea of trespass on the case for this, to wit:

That on, to wit: the 13th day of February, nineteen hundred and nine, and for a long time prior thereto, the defendant was, had been, and continued to own, control and operate a certain interstate railroad, extending from Columbus, Ohio, through Ohio and to and through the States of West Virginia and Virginia, to Norfolk, Virginia and to and through Virginia and the state of Maryland to Hagerstown in said state of Maryland, and to and through other States of the United States; that at said time and places it owned and operated upon said railroad sundry cars and engines driven and propelled by steam and was then and there a common carrier by railroad for hire, engaged in maintaining and operating said railroad as such common carrier of passengers and merchandise between and among said several states of Ohio, West Virginia, Virginia, Maryland and other states, and was then engaged in trade and commerce in through and between said states, and was using said railroad, cars and engines as the instruments of said commerce, to wit: in the transportation of passengers and merchandise from state to state, as aforesaid; that on the day and year aforesaid, the plaintiff

20 was and for a long time prior thereto had been in the employment of the defendant in the capacity of a fireman on sun-

dry of said engines used in hauling said cars, which engines and cars had for a long time prior to the happening of the grievances herein mentioned and at the time thereof were engaged in the commerce aforesaid; that as such fireman and employee, plaintiff was subject to the orders of the defendant, and on the aforesaid day and year the plaintiff was and for a long time prior thereto had regularly been assigned to duty as a fireman on a certain locomotive engine and engines, engaged in said commerce as aforesaid, at Northfork in the State of West Virginia, it being the duty of plaintiff, together with an engineman or engineer, both acting under the orders and instructions of the defendant to operate said engine and engines; that the said engine and engines, were what is known as "Pusher Engines" or "Helper Engines" and plaintiff's duty was known as "Pusher Service" or "Helper Service" and said engine and engines on which plaintiff was directed and ordered to work were assigned to the duty of pushing or helping defendant's trains going east over a certain grade extending from a point on said Interstate railway at or near Northfork in the said state of West Virginia, Easterly a distance of, to wit: fifteen miles, and sometimes to assist in pushing or helping said trains from said Northfork, West Virginia, into and through a portion of Virginia, and back into West Virginia at Bluefield, that all of the trains that said engine and engines upon which plaintiff and said engineer worked, and that were assisted over said grade, were interstate trains, to wit: carrying cars and freight and passengers from the States of Ohio, West Virginia and other states to and through the states of West Virginia, Virginia, Maryland and other states, and foreign countries; that when said locomotive engine and engines on which plaintiff was ordered by the defendant to work, were not actually engaged in pushing trains as aforesaid; they had been for a long time and were on the date of the grievance herein mentioned, regularly kept in defendant's railroad yard at the said station of Northfork, West Virginia; that whenever said engine, or engines, was or were

21 taken from defendant's main or through tracks into said yard, or brought out of said yard on to said main or through tracks, it was necessary for said engine and engines engaged in said pusher or helper service, to pass over a number of switches, and that, when said engine or engines engaged in said pusher or helper service were being taken into or out of said yard as aforesaid, it was a part of plaintiff's duty, as fireman of said engine, to walk before the same and examine the said switches and see that they were properly set and to signal to the engineer in charge of said engine or engines to proceed, and that when said engine or engines were being taken into or brought out of said yard, as aforesaid, it was the duty of the engineer in charge of any such engine to use ordinary care for the safety of plaintiff, and not to pass over any switch until signalled by the plaintiff to do so and to exercise ordinary care and caution to keep his engine under such control as not to run over plaintiff while he was so engaged in piloting said engine or engines and adjusting said switches; that on the day and year aforesaid, to wit: on February 13th, 1909, about eleven o'clock P. M., the defendant



through its officers and agents, ordered the plaintiff to report for duty as fireman on one of said engines engaged in pusher service aforesaid, at said Northfork, West Virginia, which engine was then standing in the aforesaid yard, and plaintiff was ordered, as aforesaid, to put said engine in readiness to engage in said pusher or helper service and to assist over the aforesaid grade one of defendant's said interstate trains, which was then approaching the said station of Northfork, said train being enroute from points outside of the state of West Virginia and from points in West Virginia, bound through West Virginia, and to points in Virginia; to wit: from Columbus, Ohio and from Williamson, West Virginia and through a portion of the state of Virginia, and to Bluefield, West Virginia, and to other points in the states of West Virginia and Virginia; that the defendant was then engaged in transporting goods, wares and merchandise in and upon the cars composing said trains and the other trains that plaintiff was ordered to assist over said grade, which goods, wares, and merchandise were being  
22 shipped from Ohio, West Virginia and other states to and through Virginia and other states; that in compliance with said orders from the defendant, plaintiff had reported for duty on said engine and as said engine was being brought out of said yard for the purpose of assisting the aforesaid train and other trains engaged in interstate commerce between the States of Ohio, West Virginia and Virginia and other States, the plaintiff in carrying out said orders of defendant and in the discharge of the duties imposed upon him by said defendant and in the exercise of due care was walking ahead of said engine and examining and when necessary adjusting and placing the switches over which said engine had to pass to get out of said yard on to defendant's main or through tracks, and when said switches were properly set, was giving the necessary signals to the engineer in charge of said engine to proceed, all of which it was plaintiff's duty to do.

And the Plaintiff avers that it then and there became and was the duty of the defendant, through its agent and employee, the engineer in charge of said engine, to exercise ordinary care in keeping a careful lookout for the plaintiff, and not to negligently run said engine over any switch until signalled by the plaintiff to do so, and not to negligently run said engine against or over the plaintiff and to use ordinary care in the movement and operation of said engine so as not to injure the plaintiff while he was engaged in the aforesaid duty of piloting the said engine out of the said yard in the manner aforesaid. But the plaintiff avers that in violation of its duty in the premises and in disregard of the rights of the plaintiff, the defendant carelessly and negligently and without exercising ordinary care and caution through its agent and employee, the engineer in charge of the aforesaid engine, did negligently and carelessly fail to keep a proper lookout for the plaintiff and for his signals, as it was its duty to do, and did negligently and carelessly operate said engine, in that, just as the plaintiff had approached a certain switch, to wit: the switch which connected what is known as track number 2 to the track known as the "Spark" track in said



23 yard, and before plaintiff had examined the same or had signalled for the said engineer, the said engineer not exercising ordinary care and without waiting for and receiving said signals carelessly and negligently with great force and violence ran said engine over said switch and in doing so struck and ran said engine over the plaintiff, inflicting upon him great bodily injury; so that in consequence of all of the negligence and carelessness of the defendant, as aforesaid, and of its said engineer as aforesaid, and because of no negligence or want of care on the part of the plaintiff, the plaintiff while engaged in the performance of his duties, as aforesaid, was struck and run over by the aforesaid engine, whereby and in consequence of all of said negligence and carelessness of the defendant aforesaid, the plaintiff was greatly bruised and sustained serious and permanent external and internal injuries and had one of his legs severed from his body and the foot of the other leg bruised, crushed and lacerated, resulting in the amputation of one of his legs and from which injuries aforesaid and amputation aforesaid, he became sick and sore and lame, and was compelled to remain in a hospital under treatment for a long space of time, to wit: one month, and was afterwards compelled to remain in doors and under treatment for a long space of time, to wit: six months, and from which injuries and said amputation he has, from the day of said injuries to the present time continued to suffer great pain of body and anguish of mind, and from the nature thereof will, during the rest of his life, continue to suffer said bodily pain and anguish of mind and humiliation on account of the loss of said limb, and from the day of said injury to the present time he has lost earnings he would otherwise have received and will necessarily continue to be incapacitated during the rest of his life for the performance of severe manual labor, such as he was before enabled to perform and consequently has been since the day of said injuries and will be during the rest of his life prevented from earning such salary or wages as he was enabled to earn before he was injured as aforesaid; that the loss of said leg, as aforesaid, has utterly disabled him for life from earning a livelihood.

Wherefore the said Plaintiff says that by reason of the premises he hath sustained damages to the amount of Twenty Thousand  
 24 Dollars (\$20,000.00) and that by virtue of the Act of Congress, approved April 22d, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases" an action has accrued to the plaintiff against the defendant, and therefore he brings this suit.

PACK, HINTON & PACK,  
 THOS. L. MOORE,

*Att'ys for Plaintiff.*

March 11, 1910.  
 jem.

Endorsed: D. E. Earnest v. Norfolk & Western Rwy. Co.  
 Amended Declaration.

We the Jury find for the Plaintiff and fix his damage at (\$12,500). Signed L. M. Wright, Foreman. Filed March 12, 1910.  
 S. W. Martin, Clerk.

*Summons.*

UNITED STATES OF AMERICA,  
*Western District of Virginia, ss:*

To the Marshal of the Western District of Virginia, or to any of his deputies, Greeting:

We command you to summon The Norfolk & Western Railway Company, a Corporation, if to be found in your District, to be and appear at the Clerk's Office of the Circuit Court of the United States for the Western District of Virginia, at Rules to be holden at Roanoke, in the District aforesaid, on the 3rd Monday of March, 1910, to answer D. E. Earnest (Amended Declaration, filed by leave of the Court) of a plea of Trespass on the Case Damages \$20,000.00.

And this you will in no wise omit, under the penalty of the law in that case made and provided, and have you then and there this writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Roanoke, this the 12th day of March, in the year of our Lord one thousand 25 Nine hundred and ten, and of our Independence the 134th year.

[Seal of the Court.]

S. W. MARTIN,  
*Clerk United States Circuit Court,*  
By W. BRUCE BUFORD, D. C.

Endorsed: Legal service of the within writ accepted. Norfolk & Western Railway Co. by Robertson, Smith & Wingfield, Att'ys. Filed March 12th, 1910.

*Demurrer.*

In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST

v.

NORFOLK & WESTERN RAILWAY COMPANY.

And the said defendant demur- to the said amended declaration, and to each count thereof, and to each breach thereof, and saith that the said amended declaration and each count thereof, and each breach thereof, are not sufficient in law, and for grounds of demurrer, the said defendant assigns the following:—

I.

The declaration relies on the Act of Congress approved April 22nd, 1908, and entitles "An Act relating to the Liability of com-

mon carriers by railroad to their employees in certain cases," as creating a liability on the part of the defendant to the plaintiff. The said act is void for the following reasons:—

*a.* The act is not a regulation of commerce, or of commerce between the states.

*b.* The act is unconstitutional in declaring a rule of liability for "Every common carrier by railroad, while engaged in" interstate commerce in favor—"any person suffering injury while he is employed by such carrier" In interstate commerce, different from the rule of liability applied to employees similarly engaged of other persons or corporations and applies to all employees without regard to the hazard of their work. The act is in violation of the fifth amendment of the constitution of the United States being an arbitrary imposition of liability without regard to the hazards of the business.

*c.* The act is unconstitutional as beyond the federal power because it makes the carrier liable for the negligence of the interstate employee.

*d.* The act is unconstitutional, Section 5 thereof being void for the following reasons:—

1. The section is not a regulation of interstate commerce, and prescribes no rule by which either traffic, transportation or commerce is regulated:

2. The section is class legislation:

3. The section is an unwarrantable interference with the liberty of contract protected by the fifth amendment to the Constitution of the United States.

*e.* The act is void because it imposes duties upon, and gives privileges to, personal representatives not given or imposed by *privileges to, personal representatives not given or imposed by* the laws of the States, appointing them and by whom they are controlled, and is further void because it is an infringement upon the right of the state to enact its own laws with respect to the devolution and distribution of estates of deceased persons.

SMITH & WINGFIELD, *p. d.*

Endorsed: D. E. Earnest, vs. Norfolk & Western Railway Company. Demurrer. Filed March 28, 1910. Stanley W. Martin, Clerk.

### *Plea.*

In the Circuit Court of the United States for the Western District of Virginia.

27

D. E. EARNEST

vs.

NORFOLK & WESTERN RAILWAY COMPANY.

And the said defendant by its attorneys comes and says that it is not guilty of the said several trespasses above laid to its charge, or

any one of them or any part thereof, in manner and form as the said plaintiff hath above thereof complained.

And of this, the said defendant puts itself upon the country.

SMITH & WINGFIELD.

Endorsed: D. E. Earnest vs. Norfolk & Western Railway Company. Plea. Filed March 28, 1910. Stanley W. Martin, Clerk.

*Order.*

In the United States Circuit Court for the Western District of Virginia, Continued and Held at Roanoke, in and for said District, on March 28th, 1910.

D. E. EARNEST

v.

NORFOLK & WESTERN RAILWAY COMPANY.

This day came the parties by their attorneys, and the defendant by leave of Court, filed its demurrer to the amended declaration, and also filed its grounds of demurrer in writing, in which demurrer the plaintiff joined.

Upon consideration whereof, it is ordered by the Court that the said demurrer be overruled, to which action and ruling of the Court, the defendant by counsel excepted.

Thereupon, the defendant, by leave of Court filed its plea of general issue in writing, and the plaintiff joined in the issue tendered.

Endorsed: D. E. Earnest vs. Norfolk & Western Railway Company. Order. Enter Henry C. McDowell. I have examined the within order Mch. 25, 1910. Thos. L. Moore, Att'y for Earnest. Filed Mar. 28, 1910. Stanley W. Martin, Clerk.

*Court Order, June 24, 1910.*

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Roanoke, in and for the said District on the 24th day of June, 1910.

Present: Hon. Henry C. McDowell, District Judge.

Among the proceedings were had the following:

June 24, 1910:

D. E. EARNEST

v.

N. & W. RY. Co.

Trespass on the Case.

This day came again the parties by their attorneys and came the following Jury, to wit:

- |                   |                        |                   |
|-------------------|------------------------|-------------------|
| 1. Jno. C. Tyree, | 5. C. W. Woltz,        | 9. L. M. Wright,  |
| 2. McH. Booth,    | 6. C. O. Murry,        | 10. W. C. Lester, |
| 3. E. G. Huff,    | 7. Tazewell Lancaster, | 11. L. W. Hyton,  |
| 4. Amen Starkey,  | 8. Chas. W. Cook,      | 12. C. C. Weeks.  |

Who having been selected tried and sworn to well and truly try the issue joined, were adjourned until 9:30 A. M. to-morrow, to which time this case is continued.

*Court Order, June 25, 1910.*

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Roanoke, in and for the said District on the 25th day of June, 1910.

Present: Hon. Henry C. McDowell, District Judge.

Among the proceedings were had the following:

June 25, 1910:

D. E. EARNEST

v.

N. & W. RY. Co.

*Trespass on the Case.*

This day came the plaintiff and defendant by their attorneys and came also the jury sworn in this case on yesterday, and it appearing that juror, J. C. Tyree, who has been sworn as a juror in this case, is sick and is not well enough to continue to serve as such juror, by consent of both plaintiff and defendant he is excused from further service as such juror, and it is agreed to try the case with the eleven remaining jurors who have been sworn in this case, and having further heard the evidence were adjourned until 12 noon, Monday, June 27, 1910, to which time this case is continued.

*Court Order, June 27, 1910.*

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Roanoke, in and for the said District of the 27th day of June, 1910.

Present: Hon. Henry McDowell, District Judge.

Among the proceedings were had the following:

June 27th, 1910:

D. E. EARNEST

v.

N. & W. RY. Co.

*Trespass on the Case.*

This day came again the Plaintiff, Defendant and the jury in this case and having further heard the evidence it is ordered that it be continued until 9:00 A. M. to-morrow.

*Court Order, June 28, 1910.*

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Roanoke, in and for the said District on the 28th day of June 1910.

Present: Hon. Henry C. McDowell, District Judge.

Among the proceedings were had the following:  
June 28, 1910:

D. E. EARNEST  
v.  
N. & W. Ry. Co.

This day came again the Plaintiff, Defendant, and the jury in this case, and having further heard the evidence it is ordered that the case be continued until 9:00 A. M. to morrow.

30

*Court Order, June 29, 1910.*

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Roanoke, in and for the said District on the 29th day of June, 1910.

Present: Hon. Henry C. McDowell, District Judge.

Among the proceedings were had the following:  
June 29, 1910:

D. E. EARNEST  
v.  
N. & W. Ry. Co.

This day came again the Plaintiff, Defendant, and the jury in this case, and having further heard the evidence it is ordered that the case be continued until 9:00 A. M. to morrow.

*Court Order, June 30, 1910.*

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Roanoke, in and for the said District on the 30th day of June, 1910.

Present: Hon. Henry C. McDowell, District Judge.

Among the proceedings were had the following:  
June 30, 1910:

D. E. EARNEST  
v.  
N. & W. Ry. Co.

This day came again the parties by their attorneys, and came the same jury, and the Court having instructed the jury and the arguments of Counsel having been heard, the jury retired to consider of

their verdict, and after some time the jury returned into court having agreed upon the following verdict: "We the jury find for the plaintiff and fix his damages at \$12,500. (Signed) L. M. Wright, Foreman. And thereupon the defendant by counsel moved the court to set aside said verdict, and the court being advised doth take time to consider said motion.

*Court Order, August 26, 1910.*

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at  
31 Roanoke, in and for the said District on the 26th day of August, 1910.

Present: Hon. Henry C. McDowell, District Judge.  
Among the proceedings were had the following:  
August 26th, 1910:

D. E. EARNEST  
v.  
N. & W. Ry. Co.

The motion of defendant that the verdict of the jury in this cause be set aside and a new trial granted, having been argued by counsel and considered by the court, it is, for reasons set out in a written opinion this day filed, ordered that said motion be overruled.

It is therefore considered by the Court that the plaintiff recover of the defendant the sum of twelve thousand five hundred (\$12,500) dollars, with interest thereon at the rate of six per centum per annum from this date until payment, and his costs in this behalf expended.

INSTRUCTIONS GIVEN AND REFUSED.

*Plaintiff's Request for Instructions.*

Plaintiff No. 1.

The Court instructs the jury that if they believe from all the evidence in the case that the plaintiff was injured while employed by the defendant to work for it as a fireman on an engine engaged in the "Pusher Service" or "Helper Service" on its road at Northfork, West Virginia and that he had been for several days assisting Interstate trains over the grade east of Northfork, and that at the time he was injured he was conducting or assisting in taking an engine out of the yard at Northfork, and that said engine was on its way out of said yard to be coupled to a train to be pushed by said engine over said grade, and that said train was made up of cars destined from the States of West Virginia and other States to points in Virginia and other States, then they are instructed that said plaintiff was

injured while he was employed by the Railway Company in commerce between the States.

Employers' Liability Act, Section 1.

United States v. International &c. Ry. Co. 174 Fed. 638.

32 Rodes v. Iowa 170 U. S. 412.

(Objected to. Given.)

### Plff's 2.

Until the enactment of the statute of April 22, 1908, an employee, such as the plaintiff was, could not recover for the negligence of his fellow servants, and the rule of law is that a fireman and engineer upon the same engine are fellow servants. The statute has changed that rule by providing that an injury which occurs in whole or in part from the negligence of the officers, agents, or employees, shall not exempt the railroad from liability. You are therefore to carefully inquire into the real cause of the injury. If you find from the evidence that it was through the carelessness of the engineer in failing to use ordinary care in looking out for the plaintiff or to wait for or observe a signal or indication which the jury believes he should have observed or waited for before driving the engine over the switch, the defendant is liable for his affirmative acts or omissions, and if those acts were negligent and if they were the proximate cause of the injury then the defendant is chargeable with the engineer's negligence.

Obj. Given.

### Plaintiff No. 4.

4. Preponderance means the weight of the evidence; that which carries conviction, which impels belief. It is not necessarily controlled by the greater number of witnesses.

No objection. Given.

5. Negligence is the omission to do that which a reasonably careful and prudent person would ordinarily do under the circumstances of any given situation, or doing that which such a person would not do. It is measured by the exigencies of the occasion.

No objection. Given.

6. Contributory negligence is the negligent act of a plaintiff, which concurring and cooperating with the negligent act of a defendant is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the Act of

33 Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defence of contributory negligence, the negligence of the plaintiff is not a bar to a recovery but it goes by way of diminution or damages in proportion to his negligence as compared with the negligence of the defendant.

If the defendant relies upon the defence of contributory negli-



gence, the burden is upon it to establish that defence by a preponderance of the evidence.

Objected to. Given.

7. The plaintiff is presumed to have exercised due and proper care at the time of the accident, and the burden of proving he was negligent is upon the defendant.

Virginia Instructions Sec. 711.

Objected to. Given.

8. The plaintiff had a right to presume that the engineer of defendant company would discharge his duties in a reasonable careful manner and in the usual and ordinary way.

Virginia Instructions, Sec. 718.

No objection. Given.

9. If the jury believes from the evidence that it was necessary or usual within the knowledge of John Drawbond for the plaintiff to walk on, along or over the tracks of the defendant company in front of the said engine while it was moving, in order to properly perform his duties of piloting said engine out of said yard, it was then the duty of the defendant company, through its engineer in charge of said engine, to use reasonable care and caution in the management of said engine and to keep such a lookout for the plaintiff as an ordinarily prudent and careful man would have done under the circumstances, to avoid running said engine upon or over the plaintiff; and if the said engineer did not exercise such reasonable care and caution and that his failure so to do was the proximate cause of the accident, then they must find for the plaintiff.

Objected to & Given.

34 11. That, if they find for the plaintiff, they will find for him such an amount of damages, not exceeding \$20,000.00 as will fully compensate him for the suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, the loss of time that naturally and proximately resulted from the injury he suffered; and if they find that the injuries sustained by the plaintiff are permanent that they will also find for him such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience and the loss of time that he will suffer in the future, subject to instruction No. 6 given for plaintiff.

In determining this as to the future they will consider the plaintiff's bodily vigor and age, as shown by the evidence adduced.

Washington & Georgetown Railroad Co. v. Harmon, 147 U. S. 571, 573-4, 584.

Objected to. Given.

12. The plaintiff if entitled to recover, is limited to compensation for injuries actually sustained and the amount is to be fixed by you in the exercise of a sound judgment. In determining the amount, you may consider the plaintiff's age, his expectancy of life, his earning capacity at the time he was injured, how, if at all, that earning capacity has been impaired, the permanency of the injury, received, and weighing all the facts, circumstances and conditions,

subject to plaintiff's instruction No. 6 fix such an amount as will compensate him. And you may allow for pain, suffering and mental anguish, the result of physical injuries.

No objection & Given.

Plaintiff's Instruction No. 13.

The Court instructs the jury that the duty the defendant owed to the plaintiff was to use ordinary care and caution for his protection in doing the work in which he was engaged at the North Fork yard; that is, such care as a reasonable prudent and cautious person would have exercised under the circumstances; and if the jury shall believe from the evidence that the engineer of the defendant company did not use such care as a reasonable prudent and cautious person would have exercised under the circumstances of this case, and that his failure to use such care was the proximate cause of the injury to the plaintiff, then they will find for the plaintiff.

Given.

Endorsed: Ernest vs. N. & W. R. Co. Pl'ff's Instructions. Given.

*Def't's Instructions Offered.*

Instruction No. 1.

The Court instructs the jury that the mere fact that the accident happened and the plaintiff was injured is no evidence of negligence against the defendant.

No objection. Given.

Defendant's Instruction No. 2.

The Court instructs the jury that in order to entitle the plaintiff to recover in this action, the burden of proof is on him to establish the negligence of the defendant as charged in the declaration by affirmative evidence which must show more than a mere probability of a negligent act. The existence of negligence must not be left wholly to conjecture, and in determining the question of whether or not the Company through its engineer was negligent it must be borne in mind that the defendant, through its engineer, was not compelled to foresee and provide against an act on the part of the plaintiff which reasonable and prudent men would not expect.

Obj. to. Given.

Def't's Instruction No. 3.

The Court instructs the jury that the duty the defendant owed to the plaintiff was to use ordinary care for his protection in doing the work in which he was engaged at North Fork Yard; that is, such care as a reasonably prudent and cautious person would have exercised under the circumstances; and if the jury shall believe from

the evidence that the defendant Company, through its engineer, exercised this degree of care and caution, then they will find for the defendant.

No objection. Given.

Def't's Instruction No. 4.

The Court further instructs the jury that if they shall believe from the evidence that the custom and practice in the North Fork Yard was for the engineer to follow the fireman with his engine as he lined up the switches, and not to wait for a signal to proceed after the first switch, then it was not the duty of the engineer to wait for such signal, and he had the right to proceed without any being given, and the fact that engineer Drawbond did approach switch number 2 where the plaintiff was injured without any further signal from him is no evidence of negligence against defendant Company.

Objected to. Given.

Defendant's Instruction No. 5.

If the jury shall believe from the evidence that it had been the custom and practice in the North Fork Yard for the fireman to go ahead and line up the switches for the engineer and for the engineer to follow the fireman with the engine at the rate of three or four miles per hour after receiving a signal to do so at switch number 3, and then to proceed without further signals being given; and if they shall further believe from the evidence that at and before the time of the accident which resulted in plaintiff's injury Engineer Drawbond was proceeding in accordance with this custom and practice in said yard, then they are told that it was the duty of the plaintiff to look out for his own protection, and if the jury shall believe from the evidence that he failed to keep such lookout or to use reasonable care for his own protection, and that his failure to do so was the proximate cause of the accident and his injury, then they will find for the defendant.

Obj. to. Given.

Def't's Instruction No. 6.

The Court instructs the jury that the defendant Company was under no greater obligation to care for the safety of plaintiff while engaged in its pusher service in the North Fork Yard than he was to care for himself.

Objected to. Given.

Defendant's Instruction No. 9.

The Court instructs the jury that if they shall believe from the evidence that it was the custom and practise in the North Fork Yard for the fireman to line up the switches and for the Engineer to follow him at a rate of three or four miles per hour without signals, or upon signal to proceed given at switch

number three, and if they shall further believe from the evidence that plaintiff was familiar with this custom and practice in said yard, and that at and before the accident which resulted in plaintiff's injury, Engineer Drawbond was proceeding in accordance with this custom, then they are told that said Engineer Drawbond had the right to act on the assumption and belief that the plaintiff in lining up the switches would take reasonable precaution for his own safety against the approaching engine.

Obj. to. Given.

Def't's Instruction No. 10.

The Court instructs the jury that it was not the duty of the defendant Company, through its engineer John Drawbond to keep a constant lookout for plaintiff while he was engaged in lining up switches but only to exercise ordinary care in keeping a lookout to prevent any danger which might be reasonably apprehended to him under the circumstances and conditions; and in this connection the Court further tells the jury that Engineer Drawbond in moving his engine out of the yard had the right to assume that plaintiff would take all reasonable and necessary precautions for his own safety.

Objected. Given.

Defendant's Instruction No. 12.

The Court instructs the jury that if the jury believes from the evidence that the plaintiff's injury resulted from his own negligence and not from any negligence of the engineer in charge of the engine that struck the plaintiff the jury must find for the defendant.

No Obj. Given.

Defendant's Instruction No. 14.

The court instructs the jury that if they shall believe from the evidence it was neither necessary nor usual for the plaintiff to be on the defendant's track while the engineer was moving his engine out of the yard of the defendant at North Fork at the place where the injury occurred and that the plaintiff's presence on the track at the place where said injury occurred was not reasonably to be apprehended, then they should find for the defendant.

38

No. Obj. Given.

Defendant's Instruction No. 15.

The Court instructs the jury that if they shall believe from the evidence that the discharge of the plaintiff's duties in regard to the switches did not necessitate his going on the track of the defendant at the place where the injury occurred and that it was not usual for plaintiff to go upon the defendant's track at such place, and if they shall further believe from the evidence that just before the accident happened, and while defendant's engineer was approaching the place where the plaintiff was hurt in the usual and customary

way, that the plaintiff attempted to cross the track immediately in front of the engine and so close thereto that the engineer could not see him for the purpose of attracting -he attention of his brother or signalling to his brother on train No. 82, and that the plaintiff by reason of a misstep or stumbling or for some other cause fell and was run over by reason thereof, that the plaintiff was guilty of negligence, and if they further believe from the evidence that this negligence on the part of the plaintiff was the sole proximate cause of his injury, then they should find for the defendant.

Obj. to. Given.

Endorsed: D. W. Earnest vs. N. & W. Def't's Instructions. Given.

*Defendant's Instructions Refused.*

Defendant's No. 11.

The court instructs the jury that the plaintiff D. E. Earnest, in entering into the service of the company as fireman in the pusher service at Northfork, West Virginia, assumed all the risks incident to the service the dangerous character of which he knew or reasonably should have known as the business was conducted by the defendant Company, at the time of the injury, and if the jury believed from the evidence that the injury complained of by the plaintiff resulted from the risk the plaintiff assumed and not from any negligence on the part of the engineer in charge of the engine that struck the plaintiff, they must find for the defendant.

Refused. Exception.

39

*Plaintiff's Instructions Refused.*

Plaintiff's Instruction #3.

If engineer Drawbond knew, or in the exercise of ordinary care should have known, that the plaintiff in the ordinary discharge of his duties, would be in a place of danger, then it was the duty of the engineer to use ordinary care and caution in looking out for the plaintiff and to observe and obey the signals given by the plaintiff, if the jury shall believe that it was the duty of the plaintiff to give such signals, and to abstain or refrain from running the engine over the switch until he had been signaled by the fireman so to do.

Refused. Given in No. 9.

Plff's 10. If the jury find from the evidence that the said engine did not knock the plaintiff down, but that the plaintiff stumbled and fell in front of said engine and that the engine caught and ran over him before he could get up and get out of the way, and if they further find that the engineer in charge of said engine did not do all he could consistent with his own safety to avoid the injury after the said danger to the plaintiff was known or might

have been discovered by said engineer by the exercise of ordinary care in keeping a lookout for the plaintiff, then they will find for the plaintiff.

Va. Instructions Sec. 785 and 650.

Refused.

Plaintiff's Instruction No. 14.

The court instructs the jury that the plaintiff had the right to rely upon engineer Drawbond performing his duties in the ordinary and usual way, and to rely upon his using ordinary and reasonable care to comply with the rules of the company; and if the jury believe from the evidence in this case that at the time and place of the injury he was not using ordinary and reasonable care in the discharge of his duty, and was not in a reasonable and usual manner complying with the rules of the company, then such failure on his part to perform his said duties in the reasonable and ordinary way, and in a manner as to reasonably conform to the  
40 rules of the company, was negligence on his part; and if the jury further believe that such negligence was the proximate cause of the injury, then they will find for the plaintiff.

Refused. Exception.

Plaintiff's Instruction No. 15.

That if the jury believe from all the evidence in the case that it was the duty of engineer Drawbond at the time of the injury to the plaintiff, to use reasonable and ordinary care in keeping a lookout upon the track for signals and obstructions, that the plaintiff had a right to rely upon his keeping such lookout, and if they believe from all the evidence in the case that he disregarded his duty and did not use reasonable and ordinary care in keeping a look-out for signals and obstructions, and that such failure on his part was the proximate cause of the injury to the plaintiff, then they shall find for the plaintiff.

Refused. Covered by Pl'ff No. 9 in so far as right.

Endorsed: Earnest vs. N. & W. R. Co. Instructions Refused.

*Opinion of Court on Motion for New Trial.*

D. E. EARNEST

v.

NORFOLK & WESTERN R. Co.

*Opinion on Motion for New Trial.*

(1) In part the evidence for the plaintiff is as follows:

D. W. EARNEST:

Page 8. Q. "Will you please state whether or not it was your duty to wave him ahead before he came over the switch?"

Ans. Yes, Sir; I was supposed to wave him ahead before he came over the switch, so as he would know the switch was right.

Q. Please state whether that was true in regard to all switches that you had to pass over?

Ans. Yes, I had to examine all switches and see that they was right and then signal him ahead, over them."

Page 9. Q. "What was your next duty after examining the switch?

41 Ans. To cross over to where he could see me and wave him ahead."

Page 13. Q. "I will ask you whether you know of the duties of an engineer in reference to running over that switch before you examined it and see it, and if so state what those duties were?

Ans. He was supposed to look out for me at that point, and wait to see, and give me time to set the switch, or to examine it to see if it was right, and then to wave him ahead before crossing over it.

Q. I will ask you this question: According to his duties state whether or not it was the duty of the engineer to wait until you had set the switch and given him a signal to proceed?

Ans. Yes, Sir."

Page 15. Q. "Now then state, without any reference to the book of rules, what according to the practice of you engineers and firemen is the duty with reference to waiting for signal and not passing over the switch without one.

Ans. Why, he would always run up the lead prepared to stop at those points and give me time to set those switches for him, and then signal him to come over them."

JOHN W. EARNEST:

Page 104. Ans. Well, the duty of the engineer is to watch out for the fireman when he is going over these switches and wait until the switches are thrown to line, and wait until he gets signal from the fireman before he passes over these switches. He has no right to pass over these switches until, he gets a signal from the fireman."

Page 119. Ans. "The fireman's duty was to go ahead in throwing switches and see that they were lined up, and if they wasn't lined up he was to line them up for the engineer and then give signal to the engineer to come ahead, if he was going ahead.

Q. Suppose they were all right, already lined up, what did he do then?

Ans. He was supposed to wave him ahead if already lined up.

Q. To wave him ahead?

Ans. Yes, Ser, if already lined up for him.

42 Q. Where did he stand when he did that?

Ans. Well, in the North Fork yard there he would have to get over on the engineer's side, on the right side of the track coming east."

Pages 124-5. Q. Now take the first switch: You say, after the fireman signals the engineer to come on he comes through that switch and then stops, does he? He isn't expected to stop when he comes through the switch, is he, and wait for another signal?



Ans. Yes, Sir; he is expected to stop before he goes through the other switch.\* \* \*

He has no right at all to go through the other switch before he gets a signal from the fireman that he is ready."

EMMET HALL:

Page 155. Q. "Will you please tell us whether you as an engineer, or whether the duties of an engineer, permit one to run over a switch until he knows whether it is set or not, or until he receives a signal to proceed?"

Ans. His duties are not to run over a switch in a yard there where he is fetching an engine out. His duty is to wait until he gets a signal, for he don't know how the switch is, may be, and if he don't know how it is he must wait for signal."

\* \* \* \* \*

Page 156. Q. "That is what I am getting at. Then is an engineer suppose- to pass over a switch at all before getting signal either to stop and let him fix it or gets a signal it is all right?"

Ans. He is supposed to get signal it is all right.

Q. Before he passes over a switch?

Ans. Yes, Sir."

See also p. 157 to same effect.

If the foregoing testimony be true, it was the duty of the engineer not to run into switch No. 2 until he had received a signal from the plaintiff to come on. It is an undisputed fact that the engineer had not received such signal from the plaintiff and had not seen him since he left the engine before it was run over switch

43 No. 3. It is argued that the escaping steam prevented the engineer from seeing plaintiff and that therefore the engineer was not guilty of negligence. But, treating the evidence for the plaintiff as true, it was the duty of the engineer to stop on approaching switch No. 2, and wait until he could and did see a signal from the plaintiff. In proceeding, at a speed of about four miles and hour, enveloped in a cloud of steam, beyond the place at which he should have stopped (according to the testimony for the plaintiff) he was, as it seems to me, guilty of clear negligence. Nor can it be soundly argued that the engineer did not have to anticipate that the plaintiff might be on the track. All three witnesses for the plaintiff testify that the fireman's custom was to cross the track to the engineer's side and then give the signal. It follows that the question as to whether or not the engineer was guilty of negligence depends entirely on which set of witnesses testified according to the truth. In view of the testimony given for the plaintiff the court can not say that there was no evidence of negligence on the part of the engineer.

(2) Numerous intelligent and almost entirely disinterested witnesses for the defendant testified in direct contradiction of the testimony for the plaintiff in respect to the practice and the duties of the engineer and fireman in taking an engine out of the North Fork yard. These witnesses agree in the statement that in ap-



proaching switch No. 2 the engineer never stopped and waited for a signal, but always proceeded unless signaled to stop. If this testimony be true, there was no negligence on the part of the engineer, and the negligence of the plaintiff was the sole cause of his injury. However, as I understand the doctrine after a rather extensive review of the authorities, the court has, under the circumstances here, no right to set aside the verdict, although it be of opinion that the weight of evidence supported the defendant's case. There was a substantial amount of evidence, not inherently incredible, which certainly supports the verdict. If the testimony for the plaintiff be true, the engineer was negligent and the plaintiff was either wholly free from negligence or he was at the most guilty of only some slight degree of contributory negligence.

There are expressions used in some of the opinion which may seem to indicate the existence of a right on the part of the trial court to set aside a verdict simply because it is contrary to what the court regards as the weight of the evidence. See *Hendden v. Iselin*, 142 U. S. 676, 680; *Rockford v. Pennsylvania Co.*, 174 Fed. 81, 83; *Patton v. R. Co.*, 179 U. S. 658, 660; *The Connemara*, 108 U. S. 352, 360; *Crompton v. U. S.*, 138 U. S. 361, 363; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 570. But in the light of the cases next to be cited, such theory must be held unwarranted.

In *Greenleaf v. Birgh*, 9 Pet. 292, 299, it is said: The court "can not legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have".

In *Railroad Co. v. Stout*, 17 Wall. 657, 665, approval is given to the following: \* \* \* when the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination."

In *Pleasants v. Fant*, 22 Wall. 116, 120, it is said: "\* \* \* it is the province of the court, either before or after verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict?"

In *Phoenix Co. v. Doster*, 106 U. S. 30, 32 it is said: "Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury. \* \* \*".

In *R. Co. v. Powers*, 149 U. S. 43, 45, it is said: "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict of testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them." (17 Wall. 657; 135 U. S. 554; 139 U. S. 469).

45 In *Sparf v. U. S.*, 156 U. S. 51, 99, it is said "The error in the argument \* \* \* is in making the general rule as to the respective function of court and jury applicable equally to a case in which there is some substantial evidence to support the particular right asserted, and a case in which there is an entire absence of evidence to establish such right. In the former class of cases the court may not, without impairing the constitutional right of trial by jury, do what, in the latter cases, it may often do without at all entrenching upon the constitutional functions of the jury."

In *Davey v. Insc. Co.*, 20 Fed. 494, it is said: "A trial by jury is a constitutional right of the American citizen, and courts may not infringe upon this right by undertaking to nullify the acts of jurors by setting aside their deliberate judgment in cases where the judges, under the evidence, would have reached a different conclusion."

In *Beatty v. Life Ass's*, 75 Fed. 65, 68, it is said: "\* \* \* when the evidence in a given case is conflicting or the facts therein disputed, or where the facts are of such character that different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination."

In *Pringle v. Guild*, 119 Fed. 962, 965, on a motion for a new trial, it is said: "The whole of this part of the case turns upon the credibility of the witnesses, or more properly upon the weight which the jury give to the testimony of the witnesses. There was a direct conflict. This conflict the jury solved. The matter was entirely within their peculiar province. \* \* \* It would be an invasion of the province of the jury to set the verdict aside, for it can be sustained on a correct theory, applicable to the facts, if the jury believed the witnesses for the plaintiff."

In *Mingle v. Mfg. Co.*, 10 Fed. 665, it is said: "It is not enough that the judge might have arrived at a different conclusion, nor even that there may have been a strong preponderance of evidence in favor of the defeated party. It is only where it is so palpable that the jury have erred as to suggest the probability that the verdict was the result of misapprehension or partiality, that the court will interfere."

46 In *R. Co. v. Price*, 97 Fed. 423, 428, it is said: "If the evidence relative to the material facts is contradictory, \* \* \*, it is the duty of the court to submit the issues to the jury."

In *R. Co. v. Lucas*, 136 Fed. 374, 376, it is said: "Where the substantial evidence upon a material issue of facts is conflicting, the question is for the jury and not for the court."

In *Menahan v. R. Co.*, 138 Fed. 37, 46, it is said, "We think the whole subject may be shortly summed up by starting with the incontestable datum that the Supreme Court has never intended to propound and perpetuate two inconsistent rules for the guidance of the trial judge. It has by distinct and definite rulings declared that, if there is any substantial evidence bearing upon the issue to which the jury might in the proper exercise of its function give credit, the court can not rightfully direct the jury to find in opposi-

tion to such evidence". (128 U. S. 443; 135 U. S. 554; 144 U. S. 408; 149 U. S. 43; 150 U. S. 361.)

See also *Brown v. R. Co.*, 7 Fed. 51; *Muskegon Bank v. Insc. Co.*, 19 Fed. 405; *Wilcox v. R. Co.*, 81 Fed. 143, 145; *Hunt v. Pooke*, Fed. Cas. 6895; *Fearing v. De Wolfe*, Fed. Cas. 4711.

(3) It is true that the account of the accident said by the engineer to have been given by the plaintiff immediately after the accident (confirmed by the testimony of numerous other witnesses) is more readily believed than is the account of it given by the plaintiff on the witness-stand. But the latter is not such that it "Could not in the nature of things be true". And herein the case at bar is wholly unlike *N. & W. R. Co. v. Crowe*, 67 S. E. 518. It follows that to set aside the verdict on this ground would be simply substituting the court's judgment for that of the jury on a question of credibility of witnesses.

(4) The actual earnings of plaintiff during his service for the defendant—accrued in part during a period of marked financial depression—averaged over \$650. per annum. He has been permanently disabled to some extent at least. There is much evidence to the effect that he can not again earn a living as a fireman or as a  
47      \$650. per annum would cost about \$14850. (*R. Co. v. Putnam*, 118 U. S. 545, 554). Considering the very substantial sum which (accepting as true the testimony for the plaintiff) should have been awarded as compensation for pain and mental anguish, I am unable to say that the jury failed to deduct from contributory negligence. And further, on the assumption stated, it is far from certain that any such deduction should have been made. If it was the duty of the engineer to have stopped before running into switch No. 2 and to have waited for a signal before moving ahead, it is difficult to charge negligence to the fireman who assumed that the engineer would perform this duty.

(5) Plaintiff's instruction- 2 and 13 do omit mention of the effect of possible contributory negligence. No objection was made at the time to either instruction by counsel for defendant on this ground. Not only is it not possible to state the entire law of a case in every paragraph of a charge; but there was evidence which, if true, tended to show that the plaintiff was not guilty of contributory negligence. It follows that plaintiff was entitled to instructions based on such view of the evidence. And finally it should be said that I am satisfied that the jury was not misled by these instructions.

(6) Plaintiff's instruction No. 6 was within my distinct recollection, not objected to on either of the grounds of objection now asserted.

I can not accede to the proposition that Congress intended that the damages in cases of contributory negligence should be equally divided. The language used in section 3 of the Employers' Liability Act of 1908 seems to me to forbid such intent. For contributory Negligence, "the damages shall be diminished \* \* \* in propor-

tion to the amount of negligence attributable to such employee." This language seems to make argument of this point unnecessary.

Nor can I see much force in the other contention. In the instruction it is said: "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to said employee". While the concluding sentence of the instruction would probably not have been phrased just as it was, had attention  
48 been called to the point; yet I do not believe that it misled the jury, or that it could possibly have done so. And it seems therefore unfair to set aside a verdict for a verbal inaccuracy so slight that it escaped the attention of both court and counsel for defendant, and which in all human probability had absolutely no effect on the jury.

(7) The objection to plaintiff's instruction No. 9 is another objection which was not made when the instructions were being settled. When first offered the first part of this instruction read: "If the jury believe from the evidence that it was necessary for the plaintiff to walk on, along or over the track" etc. The court inserted, just following the word necessary—"or usual within the knowledge of John Drawbond". And, according to my recollection, counsel for defendant then stated that this addition cured the defect in the first part of the instruction.

Moreover, there is much evidence for the plaintiff tending to show that it was usual, even if not necessary, for the fireman to get between the rails in order to better see the switch points, and also to cross the track in order to signal the engineer.

(8) Plaintiff's instruction No. 11 is not letter perfect. If the point had in any way been called to the attention of the court, the words—"the amount claimed in the declaration" would have been added. But the defect could not have misled the jury. In the opening statement for plaintiff, during the evidence (p. 59), and again in the closing argument, the jury was clearly informed that the sum of \$20,000, mentioned in the instruction, was the amount claimed by plaintiff in his declaration. The jury that tried this case was of higher intelligence than is usual. To assume that they understood the instruction in question to be an intimation by the court of the character of verdict desired by the court is to impute to the jury an entirely unwarranted want of intelligence.

As no errors in admitting or excluding evidence are mentioned in the brief for defendant I have not reconsidered any of the rulings on evidence.

From what has been said it follows that the court is constrained to  
49 overrule the motion to set aside the verdict, and that judgment must be entered in accordance therewith.

In concluding I desire to express to counsel my high appreciation of the great assistance rendered me by the two excellent briefs submitted.

HENRY C. McDOWELL,  
*District Judge.*

August 26, 1910.

Endorsed: D. W. Earnest vs. N. & W. R. Co. Opinion of Court on motion for New trial. Filed Aug. 26, 1910. Stanley W. Martin, Clerk.

(Let Bill of Exceptions No. 1 follow the opinion.)

50 In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST

vs.

NORFOLK & WESTERN RAILWAY CO.

*Defendant's Bill of Exceptions No. 1.*

Be It Remembered, That upon the trial of this cause, the plaintiff, in order to maintain the issue joined on his part, introduced the following evidence:

D. E. EARNEST, The Plaintiff.

Examined in chief by Mr. MOORE:

Q. D. E. Earnest is your name, is it?

A. D. E. Earnest.

Q. You are the plaintiff in this case here, are you?

A. Yes, sir.

Q. State whether or not you were employed by the Norfolk & Western Railway Company?

A. I was employed by the Norfolk & Western Railway Company, yes sir.

Q. For what length of time?

A. Three year- and eight months.

Q. When did you begin work for the railway company?

A. On the 13th day of June 1905.

Q. Then how long did you continue to work for that company?

A. I continued until February 13, 1909.

51 Q. What kind of work were you doing for that company?

A. I was firing a locomotive.

Q. At what place did you work?

A. I worked on the Pocahontas division, west of Bluefield.

Q. Then you worked for them nearly four years, or about four years?

A. Yes, sir; lacked four months of being four year-.

Q. Was your work during the four years out there on that division?

A. Yes, sir.

Q. It is charged here that you were injured by the railway company. Tell his honor and the gentlemen of the jury in your own way about that injury that occurred to you that night, what you were doing just before it happened, when you went on duty, how it happened, and all about it.

A. I was called on that night to fire engine 893. I reported for duty at eleven o'clock, or was supposed to report for duty at eleven o'clock but got there a little earlier than that. I got my engine ready, all that I had to do, but the engineer was late, and I done his work too or the most of it. I went down to the office when I first went there to get my shovel. I had to go down there to get my shovel. We had regular shovels that we generally fired with, and they had lost my shovel some way or other, and I had to take another one.

I came on up to the engine, got it ready, and went back to 51½ hunt for my other shovel while the engineer was coming.

I didn't find it. So when he come we started out. He got up on his engine and asked me if I was ready. I told him yes I had everything ready. He started, and I jumped down off the engine and ran to the left side and went to switch No. 3 and throwed the switch and crossed over and waved him ahead. Then I went on up the track to examine the other switches. Before I got switch No. 2 examined I was caught by the engine.

Q. Well, tell us all you remember about that, how you were caught by it.

A. Well, it was supposed I stepped in a hole where they had cleaned out for the switch bars to work across in between the ties. It was supposed I stepped in the hole and fell, but I am not positive about it, whether I stepped into the hole or not. I can't remember about falling. All I can remember of was that I was under the engine, and it seemed to me as if there was something pushing me along, and I hollered as well as I remember three times. The engineer heard me I suppose the third time, and he come down and asked me what was the matter. I told him he had killed me, that I was killed. I had this leg (right) run over right there (pointing just about or below the knee), and the engine was on that (the left) heel. I told him he had killed me and to back up, that he had my heel fast. He called me Dave, and he said "Oh, wait a minute Dave," and he took

52 hold of my heel to see if it was fast under the wheel, and he couldn't pull it out, and he got up and backed his engine off of me. Then he come down and seen what he done, after he come down there. But immediately afterwards he said he would go up to the office and get some help, I remember he said, and then he came down with some help, and they carried me up to the telegraph office.

Q. Well now, what was the extent of the injury done to you there?

A. Why, it run over this leg (right), and it had to be amputated right there, above my knee, and this heel (left) was mashed a good deal, but it has got very near well now, and isn't giving me any trouble much.

Q. When you were caught under that engine and your leg mashed in the manner you describe, and your other heel caught, did you suffer much from it?

A. Yes, sir; I suffered a great deal, and I was scared too to a great extent.

Q. Well, how much were you scared?



A. Well, I was scared pretty bad. I didn't think I could live, and I was scared pretty bad. I don't hardly know how much.

Q. Were you scared so badly that you didn't know what you were doing or not?

The defendant, by its counsel, offers objection to foregoing question because leading.

Objection sustained.

Q. Well, describe please in your own way your sensations, or the fears that you had there that night.

53 A. I don't understand you to start with.

Q. I will ask the stenographer to read the last question. (Which is done.) And I will add to the question, say as much of it as you remember.

A. Well, I remember that I was scared pretty bad, and I can't tell all that I did do nor anything like that. I don't remember it.

Q. Do you remember the talk that went on around you, or anything of that kind?

A. Well, some of it I suppose I do, yes. I suppose I remember some of it. I remember a colored doctor came immediately afterwards and corded my leg above the knee. He asked me how it occurred, and I remember telling him——

The defendant, by its counsel, object- to witness being permitted to detail what he may have said to the colored doctor.

Q. The other side objects to your telling what you told the colored doctor, but you may tell what the doctor did for you.

A. Well, he corded my leg above my knee, is all I remember of him doing.

Q. Well, when you were telling this doctor about your injuries who else was there that you can remember?

A. Why, there was some colored fellows there, I think about the time he was cording my leg. That is all I can remember of.

Q. Was Mr. Drawbond, the engineer, there?

54 A. If he was I don't remember it. It seems to me that this occurred while he had gone up to the office. I don't remember about it. I was scared bad you know and don't remember how that was.

Q. Then you don't remember what all was done and said?

A. No, sir——

The defendant, by its counsel, objects to the question because leading.

Q. When you started out that night on your duties what was the first thing you did after you left the engine?

A. Why, I run up switch No. 3 and throwed the switch and crossed over the switch and waved him ahead.

The COURT: Crossed over and did what?

WITNESS: Crossed over from the left to the right side of track and waved the engineer ahead.

Q. Will you please state whether or not it was your duty to wave him ahead before he came over the switch?

A. Yes, sir; I was supposed to wave him ahead before he came over the switch, so as he would know the switch was right.

Q. Please state whether that was true in regard to all switches that you had to pass over?

A. Yes, I had to examine all switches and see that they was right and then signal him ahead, over them.

Q. Then after signalling him at switch No. 3 what did you do?

A. I got in the middle of the track and went up the lead to examine the other switches.

55 Q. When you got up to—What was the next switch which you came to?

A. Switch No. 2.

Q. When you got there what did you do?

A. I was examining that switch, and before I got through examining the switch the engine was on me.

Q. What is the last thing you remember then?

A. The last thing I remember of was holding my torch down to look at the switch. I kinder checked up and throwed my torch down to see if the switch was right.

Q. Was it your duty to examine that to see whether it was right?

A. Yes, sir.

Q. For what purpose?

A. So as to notify the engineer and that he wouldn't run through the switch.

Q. What was your next duty after examining the switch?

A. To cross over to where he could see me and wave him ahead.

Q. On which side would you cross over to?

A. I would cross over to the right side.

Q. Which side was the switch on?

A. The switch lever was on the left side.

Q. Then it was your duty to cross over to the right side and wave him forward?

A. Yes, sir.

56 Q. Well, when you were struck by the engine which side did you fall on?

A. I fell on the right side.

Q. You fell, then, on the side where you ought to be to wave him ahead?

A. Yes, sir.

Q. With one leg on the track and the heel on the other foot caught?

A. I don't remember whereabouts my leg was at. I don't remember where this leg (Right) was at, but I remember that that one (left) was under the pony truck wheel, the little wheel in front of the engine.

Q. What kind of switch was this switch No. 2 where you were?

A. Why, it was just an ordinary derailing switch lever. A little iron bar to it about that long (indicating) I guess.

Q. About eighteen inches or two feet long?



A. Yes, sir; something like that. You can lay it over to one side and change the switch, and lay it back the other way and change it back. Lay it right over back on the ground. There wasn't any light or anything like that on it; just an ordinary little derailing switch lever.

Q. What do you mean by "just an ordinary little derailing switch lever?"

A. It was a little switch that they had at these sidings, to throw against cars when they pushed them up into the siding to keep them from coming out on the main line, so it would wreck them if  
57 they got loose.

Q. Well, was this a derailing switch place?

A. No, sir; it was on the yard. It was a switch that turned into the track on the yard, to track No. 2 there on that yard.

Q. So then at track No. 2 on the yard they were using a derailing switch lever, and this was a little lever about eighteen inches or two feet long?

A. Yes, sir.

MR. SMITH: Mr. Moore, you are not meaning by this line of questions to charge us with improper switches, are you?

MR. MOORE: No, sir; we are just trying to show what kind of equipment there was at point of accident.

MR. SMITH: What is the object of it? There is no allegation in your declaration that we had improper track or equipment.

MR. MOORE: This is so the jury may know the circumstances under which the plaintiff was attempting to perform his duties at the time he was injured.

Q. Mr. Earnest, how large a switch lever was this that was laying there on the ground?

A. Well, it was about two inches wide I guess, or something like that, and an inch and a quarter thick. I suppose that would be about the size of it.

Q. What was it made of?

A. Made of iron.

Q. What color was it?

A. Black.

58 Q. What was the color of the ground?

A. It was black too.

Q. The ground was black too?

A. Yes, sir.

Q. Did I or not understand you to say that that switch lever was laying down flat on the ground?

A. Yes sir.

Q. Please state to the jury whether or not it was easy to see that switch laying down on the ground?

MR. SMITH: Do you mean the switch itself or the switch lever that controlled the switch?

MR. MOORE: I mean the switch lever.

A. No, sir; it wasn't so easy to see it, not very easy. I could see

the track much easier than I could see the switch lever. I could examine the switch quicker by looking at the track.

Q. So then on that occasion you were examining the track to see whether it was in shape? \*

A. Yes, sir.

Q. Because you could see it easier and could see it quicker?

A. Yes, sir.

Q. Was there any other reason why you did it that way?

A. One reason why was the engineer could see me better by my being in there between the track, and it was a better place to walk.

The yard, or a heap of it, had things laying on it so you  
59 couldn't get over it, covered with ashes, coal and other stuff.

In between the track it was clean and I could get along in there better. That was one reason why I was in there, and then I could examine the switch better, and I thought I could get along better by being in there, and quicker.

Q. Then you were where the engineer could see you better when you were examining those points?

A. Yes, sir; the engineer could see me better by my being in there where I was.

Q. What was the color of the rails or switch points you were examining to see whether set or not?

A. They were worn bright on the top where the engines had run over them, and the light would shine on them and I could see them better than I could the lever in the other way.

Q. So if I understand your statement up to this point it is, that you had gotten there, and you were examining these switch points to see whether the switch was in proper shape for the engineer to go over it?

A. Yes.

Q. I will ask you whether you know of the duties of an engineer in reference to running over that switch before you examined it and set it; and if so state what those duties were?

A. He was supposed to lookout for me at that point, and wait to see, and give me time to set the switch, or to examine it to see if it was right, and then to wave him ahead before crossing over it.

60 Q. I will ask you this question: According to his duties state whether or not it was the duty of the engineer to wait until you had set the switch and given him signal to proceed?

A. Yes, sir.

Q. How do you know that was his duty?

A. Why, the book of rules say so.

The defendant company, by its counsel, asks that plaintiff introduce the rule which witness testifies is in the printed book of rules of the company.

Q. We assume that the witness refers to rule 554—

Judge JACKSON: We object and ask that the witness be permitted to find and point out the rule to which he has just referred in his evidence.

A. Well, on page 68 of the book of rules of the company, rule 554.

Q. That is the rule you refer to?

A. Yes.

Q. Please state whether or not this is the book of rules of the Norfolk & Western Railway Company that was in force and effect at the time of this injury?

A. Yes, sir.

The plaintiff, by his counsel, now offers in evidence Rule 554 above identified, and reads from the printed book of rules:

"Enginemen.

554. They must exercise caution and good judgment in starting and stopping their trains, and in moving and coupling cars so as to avoid disturbance to passengers and injury to persons or property; keep a constant lookout for signals and obstructions; stop and inquire respecting any signal not understood; use every precaution against fire and not permit burning waste, hot cinders or any other thing to be thrown from the engine, and report on the prescribed form the condition of the engine at the end of each trip."

Q. Was that the rule that you referred to as being in the book of rules?

A. Yes, sir; that was the rule.

Q. Now then state, without any reference to the book of rules, what according to the practice of you engineers and firemen is the duty with reference to waiting for signal and not passing over the switch without one?

A. Why, he would always run up the lead prepared to stop at those points and give me time to set those switches for him, and then signal him to come over them.

Q. In the discharge of your duty what place would you have to take in giving signal, on which side of the track?

A. On the right side, or where I was he could have saw me, in the middle of the track.

Q. In giving signal at No. 3 which side of the track were you on?

A. On the right side of the track.

Q. Then when you got down to No. 2 your duty was to get over on the right side after your switch was in place and to give signal?

A. Yes, sir.

62 Q. You said something about the engineer being late that night. How was that?

A. Why, he didn't get there until about leaving time. But I had the engine ready for him when he come so as it wouldn't delay us any and that we could go ahead on out and be on time.

Q. What time were you injured?

A. I was injured about 11:18.

Q. In the evening?

A. Yes.

Q. And what was the date?

A. On February 13, 1909.

Q. And at what place?

A. At North Fork, at the junction of No. 2 switch.

Q. At North Fork, West Virginia?

A. Yes, sir; at North Fork, West Virginia, near about switch No.

2.

Q. And you were then working for the Norfolk & Western Railway Company?

A. Yes, sir.

Q. Do you recall any of the duties of the engineer, or anything left for him to see to after he took charge of the engine.

A. Why, the feed to the lubricator would never be turned on until the engine would start on account of waste of oil, and they just allow you so much oil. So the feed to the lubricator would always be shut off when stopped, and not turned on until started,

63 and that was what he would have to do after starting the engine, was to start the lubricator to working, open the feed. I had done all of the other work he had to do, except to open the feed to the lubricator.

Q. And that was not to be opened until the engine was started, so as to save oil?

A. No, sir; to save oil.

Q. What would he do then in doing that?

A. He would open the feed, and he would have to look through some glasses to see how it was feeding, whether feeding too fast or not fast enough. He would have to look through some little glasses to tell.

Q. What would be his object then in watching to see whether it was feeding too fast or how it was feeding?

A. What would be the object?

Q. Yes.

A. He would have to look very close to those glasses so as to see them good. Sometimes they wasn't very clean and you couldn't see through them very well and you would have to look very close.

Q. Why would he be so particular to do that?

A. So as it would get the amount of oil he thought it ought to have. The cylinders would "scream" and wouldn't work well if they didn't have enough oil, and he would have to regulate it so that he could get through on his allowance that they would have for him and still give the engine all the oil it needed.

64 Q. Could you or not run the engine down over those two switches without watching that feed, however?

A. Yes, sir; he could have waited until we got out of the way. He wouldn't have had to have looked at the feed until he got out where he didn't have to look for signals and turn it on then.

Q. Would the engine run all right down over those switches?

A. Yes.

Q. What was the engine hauling that night, if anything?

A. It wasn't coupled to anything at that time.

Q. I believe there has been some reference to it here as a train. Is an engine not hauling anything described by the railway company as a train?

A. Yes, sir; an engine with or without cars displaying markers is a train.

Q. So an engine with or without cars when displaying markers is a train?

A. Yes.

Q. That is according to the training of you railroad men, is it?

A. Yes, sir.

Q. Well, is it according to anything else that you know of?

A. I don't understand you. Explain that?

Q. Well, you don't know how to explain that?

A. No, sir.

65 Q. When you last saw your engine before it ran over you how far was it from you?

A. Why, it was seventy-five or one hundred feet behind me I suppose. That would be my guess. Of course I don't know for sure how far it was. I don't think it was more than that; would think it was about that far when I waved him ahead at No. 3.

Q. Well, how far was it from No. 3 to No. 2?

A. Why, it was about eighty or eighty-five feet I suppose, something like that.

Q. Well, how fast was he running when you last saw him?

A. He was running very slow.

Q. How fast were you going when you went down to switch No. 2?

A. I was kinder going in a trot. I was going fast enough until I knew at the speed he was coming when I looked back that I was gaining on him instead of him gaining on me. I would always go faster to my knowledge than the engine was coming. When I looked back I saw that he was coming very slow, and I kinder trotted, and saw I was gaining speed on him and would have time to examine this switch and be ready for him when he came.

Q. You say you were going in a trot yourself when you last saw him?

A. Yes, sir.

Q. And you were running faster than the engine was going behind you?

66 A. Yes, sir; when I saw him I was going faster. When I turned around I kinder waved him ahead and I trotted up the track so as to get out of the way you know, and to go faster than he was coming so as I would have the other switch examined by the time he got there.

Q. You say that you were going faster than the engine was when you last saw it. Did the engine increase or how did it catch you at the switch so quickly?

The defendant company, by its counsel, objects to question because leading and also because calling for the opinion of the witness.

Objection sustained.

Q. Do you know whether or not at the time the engine struck you it was running faster than it was the last time you had seen it?

The defendant company, by its counsel, objects to the question because witness says he did not look again and therefore did not see

the engine, consequently an answer to the question propounded must be a mere opinion.

The Court: I think a man struck by an engine might know something about the speed at which the engine was running at the time although he was not looking at it, so I will permit the witness to answer the question.

Defendant excepts.

A. Why yes, it seemed to me that it did, that it was running faster.

The defendant company, by its counsel, objects to the answer now given by the witness, and moves the court to strike same out  
67 because not proper evidence, being a mere expression of opinion.

Objection overruled.

Defendant excepts.

Q. I will ask the stenographer to read the question to the witness as I think he did not conclude his answer when counsel on the other side interposed objection. (Which last question is read to witness).

A. Yes, sir; it seemed to me it was running faster, because it seemed it pushed me a little piece on the track after it struck me.

Q. Do you know how far you were pushed, or carried, or dragged under the engine, whatever it might have been, after it did strike you?

A. No, sir; I don't know how far. I was scared, and didn't know hardly where I was at. It almost seemed like a dream to me that I was under there.

Q. You say you were scared, and it seemed almost like a dream to you that you were under there?

A. Yes, sir; I didn't hardly know I was under the engine I was scared so bad.

Q. You have no way of telling how far it carried you, or dragged you, whatever it was, while you were under the engine?

A. No, sir; I don't know how far, couldn't tell. It seemed it pushed me. I can remember its kinder pushing me, but don't remember whether it pushed me any distance hardly or just maybe a little piece. I can't tell hardly how far it did push me.

68 Q. Please state to the jury whether you stopped anywhere between switch No. 3 and switch No. 2?

A. No, sir; I didn't stop at all anywhere.

Q. And you went between these switches you say in a trot?

A. Yes, sir.

Q. Do you mean by that that you were going pretty fast?

A. Yes, sir; going faster than a walk. I was kinder trotting out so as I might be out of the way of the engine. I was going faster than I could walk.

The defendant company, by its counsel objects to the foregoing questions and answers about the speed of plaintiff and engine, and moves the court to strike same out of the record and instruct the jury not to consider same, on the ground that there is no charge in the declaration as to improper speed of the engine complained of.

That the only negligence charged in this case is failure of engineer to keep a lookout, and failure to wait for signal. The declaration does not charge that the engine was being run at an unreasonable or excessive rate of speed while being moved on this switch.

The plaintiff, by his counsel, replies that declaration charges failure of defendant's agent, the engineer, to keep the engine under control, and that it is important the jury should know all the facts and circumstances surrounding the accident.

The COURT: In order to determine correctly the complaint here made it would be absolutely necessary to know about the speed at which the engine was traveling. It seems to me that after the fireman signalled the engineer at switch No. 3 and started toward switch

No. 2 we should know the speed at which the engine was moving, so as to know the situation there at the time of the accident. The objection and motion are overruled.

Defendant excepts.

Q. What persons besides Drawbond did you see just before the injury?

A. Why,—I saw just before the engine hurt me?

Q. Anywhere there along about switch No. 2 or switch No. 3 before you were hurt.

A. I saw train No. 82 coming by, and saw the fireman of train No. 82.

Q. Did you know him?

A. Yes, sir.

Q. How is it that you happen to know you did know that fireman?

A. Why, I kinder throwed my torch up, that way (indicating), and waved at him.

Q. Was he on the train you were to help push?

A. Yes, sir.

Q. Who was that fireman?

A. Mr. Will Ingram.

Q. On which end of No. 82 was he?

A. He was on the head engine.

Q. And that was the train then that you were ordered down there to push out that night?

A. So they told me, that I was ordered to push it. We had never got our orders yet.

70 Q. Well, it has already been stated here that you were ordered down there to do that, so there is no question about that.

A. Yes, sir.

Q. How far were you from that train when you were actually hurt?

A. Why, I was I suppose something like one hundred feet from it. I was across on the north side of the yard, and he was on the eastbound main line. I suppose 100 feet would be about the best I could tell. Of course I don't know how far it was across there.

Q. Did Ingram make any sign at you, or wave at you, so that you could identify him as seeing you?

A. No sir; I don't think he did. I don't think Ingram saw me.



Q. You don't think he did?

A. No, sir.

Q. How far did you say you were from this point you say the train was that you were going to push when you were actually hurt?

A. Well, I don't know but something like one hundred feet I suppose across to where it was. I don't know exactly; it might not have been that far, but don't think it was over one hundred feet.

Q. Where would you actually have gotten in to that train had you not been hurt?

A. I would have gotten in behind it at the yard office.

71 It wouldn't stop; we would have to go on behind it and run and catch it. That was the rule; the way we pushed down there. It wouldn't stop for us, and we would run up and couple to them so as they wouldn't have to stop and cause any delay.

Q. Now we will go back and take up the matter of your injury: You say that colored physician was one of the first parties to get to you?

A. Yes sir.

Q. And he bound up your legs, both of them, did he?

A. No, sir; he just corded the right leg but didn't do anything to the left leg at all. He just corded my right leg above the knee. It was bleeding a good deal and he corded it above my knee.

Q. Stand up and show the jury about where the wheels did pass over your leg.

A. They ran over that leg (right) just below my knee as well as I can remember. I don't hardly know exactly where it was but right along there somewhere. (Indicating.) When it stopped it had this heel (left) caught and if it had went very much farther it would have cut that off. It mashed my heel right along there (indicating) some little, and mashed my shoe heel to a great extent.

Q. What was the condition of your leg after you were gotten out from under the engine.

A. Why, it was cut nearly off. My clothes I suppose or so they told me though I couldn't look at it you know hardly, but  
72 my clothes they told me, and flesh, had kinder held it together. The bone was crushed I suppose all to pieces, and my clothes and flesh and stuff mashed up together kinder held it on. They picked up my leg when they carried me to the station, and one man had to carry my foot and that leg so that it would hold up. I think that was the way they carried me.

Q. Were you bleeding much?

A. Yes, sir; I was bleeding a good deal, as well as I remember.

Q. What pain were you suffering?

A. I was suffering a good deal, and I was scared too. I couldn't hardly tell you all it was hurting me. It hurt me worse after I got to the office to the best of my knowledge than it was down there. I remember asking the doctor to do something for me to keep me from suffering so. I remember that.

Q. Do you remember whether the doctor did anything for you?

A. Yes, sir; they injected something into my arm, I think — was all the place that they did it. I think they just injected something into my arm.



Q. Did you hear them say what they injected into your arm?

A. Well, no, I believe it was morphine. I believe some one afterwards told me that, but I don't know who it was.

Q. How long after you were hurt was it before they began putting this morphine into your arm?

A. Well, it wasn't very long. I don't know how long but it wasn't so very long afterwards.

Q. What went on after they began to put morphine into your arm, can you remember that?

A. I remember some of it and some I don't. I was suffering a great deal, and was scared too. I remember asking the doctor if he thought I could live. And I remember asking him if my leg could be amputated above my knee, and I remember asking him if they could save this leg (left). I think he told me it might be amputated below my knee all right. I forget what he said about my left heel. I forget what he did say about that.

Q. You say you were so scared you can't remember. Do you remember how badly scared you were?

A. I remember that I was scared so bad I didn't think I would live. I had a brother firing, and I remember asking them to get him to quit firing. I think I asked Mr. Drawbond to get him to quit, and maybe I asked others, I don't remember who all I did ask, but I asked several.

Q. Well, do you remember where it was that you asked Mr. Drawbond to get your brother to quit firing?

A. No, I don't remember. I asked him at the office I think, and I don't remember whether I asked him before I got to the office or not.

Q. Then at that time you were afraid you were going to die, and asked them to get your brother to quit?

A. Yes, I didn't think I would get to see him.

Q. You mean that you didn't think you would live to see your brother?

A. No, sir.

Q. Where was your brother then?

A. He was going over the hill.

Q. He was then in the train you were to have pushed, was he?

A. Yes, sir.

Q. And you didn't think you would live to see your brother?

A. No, sir.

Q. Well, did you have any conversation with Drawbond?

A. Why, yes, I was talking to him, and I remember asking him to go to Bluefield with me. I remember telling him not to worry about it, that possibly I was in fault. He was worrying a good deal and I didn't want him to worry about it.

Q. So then you remember asking him to go with you to Bluefield?

A. Yes, sir.

Q. And you asked him not to worry about it, that possibly you were in fault?

A. Yes, sir.

Q. Did you know who was in fault?

A. Yes, sir; I knew that he was coming—

The defendant company, by its counsel, objects to plaintiff stating what he knew or inferred or surmised, and asks that he be required to state what actually happened there so that those events may speak for themselves.

75 The COURT: The court thinks that counsel for plaintiff should have the right to a full explanation from the witness why he made the statement witness says he made to Mr. Drawbond. He is entitled to explain whether he meant literally what his language would be construed to imply, or whether, as he says, he said what he did to relieve the feeling of distress on the part of Drawbond.

Defendant excepts.

Q. Well then, you thought you were going to die and would not see your brother?

A. Yes, sir.

Q. What did you say your object was in telling Drawbond it might be your fault?

Defendant objects.

Objection overruled.

Defendant excepts.

A. I didn't want him to worry about it. He was worrying a good deal about it, and I didn't want him to worry about it, and I told him possibly it was my fault. I don't remember what all I did say to him about it.

Q. You don't remember what all you did say?

A. No, sir.

Q. So they got you down to the station you refer to. How long did they keep you there?

A. Why, I think they kept me there about two hours.

Q. What was the effect of those drugs and medicines that they gave you? Did they relieve the pain any?

A. Yes, sir; they relieved the pain, and seemed to kinder make me numb and drowsy and sleepily like.

76 Q. Do you know what went on then while you were down at the station, all the time?

A. No, sir; I don't remember what all went on at all. I remember of them carrying some pillows, and I believe they brought a quilt or two from my boarding house to lay under me. I don't hardly remember what all did happen while I was there.

Q. Where did they take you to from there?

A. They brought me to Mr. Fox and St. Clair's sanatorium, at Bluefield.

Q. How far was that from where you were hurt?

A. About 21 miles I believe.

Q. Do you know yourself what time you got to Bluefield? I mean, without reference to what somebody told you, or would you have to go by what somebody else told you?

A. No, sir; I don't hardly know when I got there. I remember

of them putting me in the carriage, and I remember when they passed where Mr. Fox and St. Clair's sanatorium used to be they said. It seems to me like my brother says "This is the place", and they said no, and that is the last I remember. I don't remember of them taking me out of the carriage at the sanatorium at all, and don't remember when they put me in the operating room.

Q. What was the result of that operation when you came to yourself? Where did they amputate your leg?

A. They amputated it right here. (Indicating about half way between knee and thigh on right leg.)

77 Q. Stand up and show where it was amputated?

A. It was nine inches from here down to where they amputated.

Q. The stub is nine inches long?

A. Yes, sir.

Q. There is no objection to your removing your pants leg and showing how that was.

A. You mean, to pull my pants lég up?

Q. Yes.

A. (Witness pulls right pants leg up near thigh.) Right there is about the end of my stub.

Q. You then didn't know when they took you to the hospital or when you were operated on?

A. No, sir; I didn't know when they took me in there. I remember though when they put me to sleep; kinder remember when they held the concern over my face to put me to sleep.

Q. When they began to give you an anæsthetic to put you to sleep?

A. Yes, sir.

Q. And held something over your face, you remember that?

A. Yes, sir; when they held something over my face, I kinder remember that.

Q. Did you still think you were going to die?

A. Well, I don't know hardly. I can't think of anything hardly but that. I remember of them putting me to sleep, and that is about all I can remember of them doing. I didn't know

78 hardly anything then much.

Q. When was the next time after that that you were conscious?

A. Why, after they brought me into my room, where they brought me when they took me out of the operating room and took me into the other room where I stayed until able to get out of the hospital.

Q. Do you remember what time of day it was when you became conscious again?

A. No, sir; I don't remember.

Q. Was it the next day?

A. Why yes, I think it was some time the next day possibly, and I don't know whether before noon or afternoon, don't remember.

Q. After you became conscious what was your condition for awhile after that?

A. I was suffering a great deal. I was very weak, and the reason why I knew I was weak they wouldn't allow anybody in the room where I was. Several come to see me and they wouldn't allow them to come in because I was so weak, and they didn't think I was going to get well——

The defendant company, by its counsel, objects to witness stating what others may or may not have thought about his getting well.

The COURT: No, that is not proper and the jury will disregard it.

Q. Do you know whether you bled much or not?

79 A. Yes, sir; I bled a great deal I suppose. They had a pillow under my leg, a feather pillow, while I was going from North Fork up to Bluefield, and they told me afterwards that it was——

Q. Counsel on the other side will object to that. I will have to stop you once in a while myself. You can tell what you knew about it, but what other people told you I expect the other side will object to. What was the extent of your suffering after they had operated on your leg, taken it off, how did it hurt you then?

A. Why, I couldn't hardly tell. It was just awful pain I know, and I couldn't hardly move in bed it hurt me so bad for a good while.

Q. How long did it continue to hurt you?

A. Why, it continued to hurt me about a week I believe that way. And then after I got out of the hospital why it didn't hurt me so much in daytime, not so very bad. I can sit down and rest for awhile, but couldn't sleep at night. It hurt me to a great extent at night. I couldn't sleep for quite a while at night from it. I would just sleep a little, a nap at a time, and it would hurt me so bad it would wake me up.

Q. Tell me if it still hurts you.

A. Well, I haven't saw a pleasant day since the accident occurred. It hurts to some extent all the time, and of a night now I can't sit down and read, it worries me of a evening. Of a morning like I can sit down and it don't bother me so bad, but still  
80 it hurts me a little all the time, and at night I can't sit down and read for it, it bothers me so much.

Q. So then it still hurts you. Was it hurting you yesterday?

A. Yes, sir; and last night. I was reading down at the hotel last night, and I had to lay the paper down, it was hurting me so bad I couldn't sit and read with any satisfaction.

Q. What kind of pain is it?

A. Well, I don't hardly know what kind of pain you would call it. It is just a kind of sticking feeling and hurting.

Q. Takes your mind off other things you are trying to do?

A. Yes, sir.

Q. So that you can't read of an evening?

A. No, sir.

Q. Well, tell us what effect it has when you walk around very much, if any.

A. Well, in hot weather I gall, and get sore, and it worries me so in walking that I can't walk to do any good around on the farm to

do anything. Where it is smooth I can get along very well, but in plowed ground, or in rough places like that I can't walk to do any good at all.

Q. How do you get up and down steps with it?

A. I have to bring this left leg up first and then carry the right leg up behind it, on account of not having any knee I can't raise up on it.

81 Q. How do you get down steps with it?

A. I have to put it down first and then bring the other down to it.

Q. What effect has it on you in trying to mount a horse while on a farm.

A. Well, I can get on a horse very well. I can put this left foot up in the stirrup and pull up that way by the horse's mane and the saddle, if the knee joint don't happen to throw me. Sometimes it throws me. I have got so I can hold it in a position so it won't throw me, but it would throw me when I first started to get on a horse.

Q. What effect has it on you if you try to carry anything?

A. I can't step with anything. Carrying anything I can't step. I can't carry anything at all that has any weight about it. I can't step with it.

Q. Well, suppose you had to walk two or three or three or four miles, what is the effect on you?

A. Well, I couldn't walk that far, that is, to go right on. I would have to rest. I couldn't walk that far if——

Q. You couldn't walk three or four miles?

A. No, sir.

Q. Tell us what effect it has on you in working on a farm?

A. Well, I can't do anything much unless it is something riding. If I can ride and drive a team where there isn't anything to  
82 load or unload anything like that I can do it. I can drive a team, but I can't load or unload anything. I always have to have some one to do that.

Q. What effect does it have on your getting up into a wagon when you are getting ready to drive; does it inconvenience you then?

A. Why yes, I can't get up good, but I can kinder pull up if I have something to pull up by, and drag this leg up. I can't step up with this leg but have to drag it up.

Q. So then if you have something to pull up by so that you can get on the wagon you can drive the horses?

A. Yes, sir.

Q. But you can't unload a wagon, nor can you load a wagon?

A. No, sir.

Q. Well, can you plow corn?

A. No, sir; I can't walk through ploughed ground.

Q. Can you hoe corn in plowed ground?

A. No, sir; not to do any good. It worries me so bad I can't do it. I always have to have my weight on this left leg, and it directly gives out on me, and I can't follow it any time hardly.

Q. Can you follow a cradle in the harvest field?

A. No, sir.

Q. Can you use a cradle in the harvest field?

A. No, sir.

Q. Or a mowing scythe?

83 A. No, sir; I couldn't use it to do any good.

Q. Have you been trying to do such work as you could do on a farm to find out?

A. Yes, sir; I have been trying to do what I could.

Q. And you have met with these difficulties we have been asking you about?

A. Yes, sir.

Q. Well, now, do you know of any kind of employment you could do?

A. No, sir; I don't know of anything unless it is that I could stay in a store. I might stay in a store or something like that where there wasn't much walking to do.

Q. If you had a store where there wasn't much walking to do you might do that?

A. Yes, sir.

Q. Or, you mean, where there wasn't much standing on your feet?

A. Yes, sir; where there wasn't much standing on my feet, or not too much customers to wait on. I couldn't wait on customers all day long; couldn't be on my feet all day long.

Q. Have you tried to get a position of that kind?

A. Yes, sir; I have asked for a position of that kind but failed to get it. I have never got any yet.

Q. What other efforts have you made to get employment since you were hurt?

A. Well, I asked the railroad company for employment.

84 Q. What railroad company?

A. The Norfolk & Western Railway Company.

Q. Did they give it to you?

A. No, sir.

Q. How many times did you ask them for employment?

A. Why, I don't remember. I went to the office, and told them, and told the Road Foreman, Mr. Woolwine I wanted to get work, and he said possibly they could find me something. And I went to the train master's office and told them I wanted to get a job.

Q. Have they ever given you a job?

A. No, sir.

Q. What else happened while you were at the train master's office trying to get a job.

A. Why, I made off a statement to the train master's clerk.

Q. He asked you to make up a statement, the train master's clerk?

A. He did. He told me he wanted to get a statement from me.

Q. Who wrote the statement?

A. The train master's clerk. I don't know what his name is, I forget.

Q. You were there then trying to get a job?

A. Yes, sir.

Q. Well, how many of these statements did they take from you?

85 A. Why, they took two different statements. I gave one to the train master's clerk, and one to the superintendent's clerk. I think they made more than two copies, but there was just two that I signed.

Q. Have they several copies of the statements that they did take?

A. I think they made some three or four up in the superintendent's office. I don't remember how many copies there was, but I just read one and signed it.

Q. Did they give you a copy of it?

A. No, sir.

The defendant company, by its counsel, objects to foregoing questions and answers with reference to statements made and signed by plaintiff, and says that at the present time at least same is irrelevant.

The COURT: It has a bearing on plaintiff: witness' attempt to get employment from defendant company, and for that reason the objection is overruled.

Defendant excepts.

Q. Do you know whether they made any other efforts to get a written statement out of you?

The defendant company, by its counsel, objects to a continuation of examination of witness along this line at this time as irrelevant and improper.

Objection sustained.

Q. Are you earning anything now on the farm?

A. No, sir; but very—well, I don't suppose you could count it anything. I don't pretend to do any kind of work.

Q. Where are you living?

86 A. I am with my father. Of course I kinder jimmy around and help him a little bit, what I can do.

Q. Where does your father live?

A. He lives in Smyth county, Virginia, near Marion.

Q. He is a farmer up there, is he?

A. Yes, sir.

Q. Are you a single or a married man?

The defendant company, by its counsel, objects to the question as irrelevant, immaterial and improper.

Plaintiff's counsel does not insist on an answer or ruling on the objection.

Q. Mr. Earnest, how old were you when you were hurt?

A. I was 23.

Q. How long had you been working for the railroad when you were hurt?

A. I had been working three years and eight months.

Q. Had you ever had any trouble with the railroad?

A. No, sir.

Q. Do you know whether your services had been satisfactory to the railroad?



A. Yes, sir; they had been satisfactory. They had given me credit records every year.

Q. What kind of things are those credit records they had given you every year?

A. They would just notify me that I had a clear record, and had been giving them satisfaction, and they would add thirty days to my credit.

Q. Did they inform you to that effect every year?

A. Yes, sir.

Q. And they gave you thirty days to your credit every  
87 year while you worked for them?

A. Yes, sir.

Q. Well, according to your credit system do you know whether they could give anybody else any more than thirty days or not?

A. No, sir; they said that was the maximum allowance under the rules.

Q. So then you got the maximum allowance for good conduct under the railroad company's rules?

A. Yes, sir.

Q. I now show you a letter which I understand to be this credit record you refer to, dated June 19, 1907, and will ask you if this is one of the credit records that you have referred to which the railroad company gave you.

A. Yes, sir; that is one of them.

The letter is introduced in evidence, read to the jury, and, for the purpose of identification, marked "Plaintiff's Exhibit No. 1."

Norfolk & Western Railway Company.

BLUEFIELD, W. VA., *June 19, 1907.*

Mr. D. E. Earnest, Fireman, Coalwood.

DEAR SIR: We have the following from Sup't of Motive Power:

"In looking over our records we find that Mr. D. E. Earnest, Fireman, has not had a single suspension recorded against him during the year ending April 30, 1907. This is a very gratifying  
88 thing to the officers of this company, as it manifests a great deal of interest and pride taken in the work by Mr. Earnest, and in order to show our appreciation of this good work we have accordingly given him a credit of thirty days on his record, which is the maximum allowance under the rules.

"We sincerely trust that the interest shown by Mr. Earnest during the past year will not be allowed to diminish, but, if possible, to increase, so that at the end of the next year, ending April 30, 1908, we will have the pleasure of adding a further credit to his record.

"Please notify him accordingly."

Yours truly,

L. D. GILLETT,  
*Master Mechanic.*  
H.

Q. I now show you two other letters, bearing as I understand upon the same subject, one dated May 25, 1908, and the other dated May 25, 1909. I will ask you if you received these letters from the railroad company.

A. Yes, sir; I received them.

The letters are introduced in evidence, read to the jury, and, for the purpose of identification, marked as follows: "Plaintiff's Exhibit No. 2."

"Norfolk & Western Railway Company.

BLUEFIELD, May 25, 1908.

Mr. D. E. Earnest, Fireman, North Fork.

89 DEAR SIR: We have the following from the Superintendent of Motive Power:

"In looking over our records we find that Mr. D. E. Earnest, Fireman, has not had a single suspension recorded against him during the year ending April 30, 1908. This is very gratifying to the officers of this company, as it manifests a great deal of interest and pride taken in the work by Mr. Earnest, and in order to show our appreciation of this good work we have accordingly given him a credit of thirty days on his record, which is the maximum allowance under the rules.

"We sincerely trust that the interest shown by Mr. Earnest during the past year will not be allowed to diminish, but, if possible, to increase, so that at the end of the next year, ending April 30, 1908, we will have the pleasure of adding a further credit to his record.

"Please notify him accordingly.

Yours truly,

L. D. GILLETT, M. M.

"PLAINTIFF'S EXHIBIT No. 3."

Subject: Credit entry of thirty days clear record April 30, 1909.

Norfolk & Western Railway Company.

BLUEFIELD, W. VA., May 25, 1909.

Mr. D. E. Earnest, Fireman.

90 DEAR SIR: We have the following from the Superintendent of Motive Power:

"In looking over our records I find that you have not had a single suspension recorded against you during the year ending April 30, 1909. This is very gratifying to the officers of the company, as it indicates that a great deal of interest and pride has been taken in the work by you, and in order to show our appreciation of this good work we have accordingly given you a credit entry of thirty

days on your record, which is the maximum allowance under the rules.

"I sincerely hope that the interest manifested by you during the past year will not be allowed to diminish, but if possible to increase so that at the end of next year which ends April 30, 1910, we will have the pleasure of adding a further credit record.

Yours truly,

J. J. BARRY,  
*Master Mechanic."*

Q. When you applied to some merchant, as You stated, to try and get a place in a store what success did you have there?

A. I didn't get any place. He said he would see if he could give me a job, but he couldn't tell me for sure about it at that time. But I haven't heard anything further from him. I asked several others but they told me they hadn't got anything for me.

91 Q. Were you raised on a farm?

A. Yes, sir.

Q. Well now, outside of farm work what other employment did you have?

A. Why, I first worked for the railroad that ran from Marion to Grayson. I worked on grade awhile, and then left there and went to West Virginia, and worked for a lumber company awhile, Crosby & Beckley Lumber Company, near North Fork. Then I went back home, and worked at Saltville a year. I then went to work in West Virginia, and immediately after I went back I worked for the Crosby & Beckley Lumber Company again, and worked there until they finished up. Then the superintendent of the Crosby & Beckley Lumber Company gave me a recommendation to Mr. Culliney, for a job as fireman, and I came to Bluefield and got a job as fireman.

Q. And you have worked for the railroad company ever since?

A. Yes, sir.

Q. Are you in your present condition able to work for the lumber company?

A. Now?

Q. Yes.

A. No, sir. I was working on a dinkey, hauling lumber, and I couldn't work for them in the condition I am now in.

Q. Are you able in your present condition to be a fireman on the railroad?

92 A. No, sir; I don't suppose I could.

Q. Or an engineer?

A. Well, I might run an engine, but I don't know.

Q. Have you been able to get a job of that kind?

A. No, sir. I don't suppose I could get a job with a limb off.

Q. What is your answer to that?

A. I don't suppose I could get a job with my limb off like that. I don't suppose any company would hire me to run an engine, although I might be able to run one, but don't suppose they would let me. I know I couldn't get it.

Q. Could you get off and on engines?

A. Yes, sir; I could get up and down but couldn't do it good. I couldn't get up quick, or get down quick, but if you give me time I could get up and down from an engine.

Q. What wages did you earn while you worked for the Norfolk & Western Railway Company?

A. Well, when work was good I averaged about \$90.00 or \$95.00 a month. That is when work was good. I have made I think a little more than that, but don't know just what, and \$95.00 is pretty close to it.

Q. That was while working as a fireman?

A. Yes, sir.

Q. What did you mean by "when work was good"? Was work not as good part of the time?

A. Why, during the year 1908 I believe it was, work wasn't good then, and they put a lot of engineers back to firing, and I didn't hold as good a run, and part of the time I didn't have any  
93 run at all and had to fire extra, what they call firing extra. I didn't make very much during that time for awhile.

Q. Were a number of men laid off, or put back, or what was the trouble?

A. Work was slack, and the engineers they had promoted to runs, they had more than they could work, and had to put some of them back to firing. So they cut some of the firemen off, and didn't have any job for them at all, and some firemen that had runs were cut back to extra runs, and others that had good runs would be cut back to runs that didn't have very much money in them, or something like that, you know.

Q. They didn't cut them off entirely? Didn't cut you off?

A. No, sir; they didn't cut me off.

Q. How much money did you earn during those bad times?

A. Well, I didn't earn very much, but I don't remember what.

Q. Have you anything that will show what you earned then?

A. I have my time down here on a book where it shows what I earned.

Q. So what you have earned, if you have a memorandum of it, show it for the month of January 1909, which was the month before you were hurt.

A. \$85.89.

Q. That was during the month of January 1909?

A. Yes, sir.

94 Q. Well, examine your memoranda or account, whatever it is over there, and see what you earned during the month of December before you were hurt.

A. \$83.04.

Q. That was December 1908, before you were hurt?

A. Yes, sir.

Q. Examine your memoranda if you have it with you for the month of November 1908?

A. I made \$62.72.

Q. What was the highest amount you remember to have earned in any month while you were a fireman?

A. Well, I made, the way I kept it, ninety-seven dollars and a little over one month, but I didn't, some way or other, draw that much. Possibly I might have made a mistake. Then there was several of them that pay-day that were short too, and they carried it over. I don't remember how mine came out about that time. I don't think they carried any over for me, but I had it down ninety-seven dollars and something.

Q. You say you made a mistake. How much did the railway company pay you then?

A. I don't remember how much I drew that pay-day. I drew pretty close to it; wasn't but a dollar or two behind.

Q. The railroad company actually paid you \$95.00 or \$96.00, something like that?

A. Yes, sir; they paid me up towards that.

95 Q. The railroad company kept a record of this, didn't they?

A. I suppose so.

Q. Don't you know that they have a record of the amount they had to pay you?

A. Why, I don't know for sure. I suppose they have, but don't know.

Q. How do you account for one month running down to \$62.72?

A. Why, that was during that time when work wasn't good. I think possibly I was on the extra list at that time.

Q. You didn't have as much work at that time?

A. No, sir; I didn't have as much work. Some times I wouldn't make but maybe one or two or three days in a week.

Q. Mr. Earnest, do you know where this train came from that you were going down to push that night you were hurt, No. 82?

A. The train I was to push?

Q. Yes.

A. I suppose it came from somewhere out of Ohio, or somewhere down there.

The defendant company, by its counsel, moves the court to strike out the last foregoing answer of witness because a mere opinion.

Motion sustained and jury instructed to disregard the answer.

Q. From what direction did it come?

A. It was coming east.

Q. Was that from the direction of Ohio?

96 A. Yes, sir.

Q. Where would that train go to if it were not broken up? That is, if the cars of that train were not taken out of the train, where would it go to from North Fork?

A. It would come on into Bluefield.

Q. In getting to Bluefield please state whether or not it passes through Virginia?

A. Yes, sir; it passes through Virginia. It goes into Virginia somewhere near Falls Mills I suppose, and goes back into West Virginia east of Graham.

Q. How far would it travel after leaving North Fork before it would get into Virginia?

A. Why, it would travel about ten or fifteen miles I suppose, somewhere along there. I don't know just how far it is up there.

Q. Was there any place between North Fork and the point where it would get into Virginia where trains were broken up or distributed?

A. No, sir.

Q. So then after it passed North Fork it would run as a solid train until it got into Virginia?

A. Yes, sir; unless they had a car of fresh meat or something like that that they would set off. I believe they had a cold storage at Elkhorn, and that is the only place I know of that they would set one off at.

Q. With the exception possibly of a car of fresh meat that might be set off at Elkhorn it would run as a solid train into Virginia?

97 A. Yes, sir.

Q. Then after it got into Virginia where would it go next?

A. To Bluefield.

Q. That would be in West Virginia again, would it?

A. Yes, sir.

Q. That was the train you were going to push the night you were hurt?

A. Yes, sir.

Q. How long had you been engaged in that kind of work, in assisting these trains by North Fork and east into Virginia and on towards Bluefield?

A. Well, I had fired these pushers before, but I had them this last time nine days. I commenced firing them the 5th of February and got hurt on the 13th, the night of the 13th. I made one day on the 13th, and was reporting for duty again that night at eleven o'clock on the 13th.

Q. You then were in this pusher or helper service the last time nine days?

A. Yes, sir.

Q. How many runs had you made, or how many trains had you assisted during that period of nine days, as you remember?

A. I don't remember how many. I never kept any account of it. We would sometimes assist from one to four trains over the hill. Some days we wouldn't assist but one, and would do some other work, help the yard crews deliver cars to the coal operations, and then sometimes we would push these trains over the hill. That was the most we would do. We would do that the most of anything else, assist loaded trains over the hill.

98 Q. Then when you were in this pusher or helper service during the last nine days you refer to, that was the principal thing that you had to do, to assist these trains over the grade?

A. Yes, sir.

Q. And those trains were interstate trains that you have been referring to, if you know what "interstate" means?

A. Yes, sir.

Q. Interstate means running from one state to another.

A. Yes, that was interstate trains.

Q. A part of your employment then, some time before this period of nine days you refer to, was shifting cars and things about North Fork. Was it up to the mines?

A. Yes, sir; they had what they call yard crews that delivered cars up the North Fork hollow.

Q. Where do those cars come from that you carried up to the coal mines?

A. Why, they would come back from different points, I suppose, where they was unloaded of coal. They would be coal and coke cars, and some of them I think was unloaded at Newport News I think maybe.

Q. Newport News, Virginia?

A. Yes, sir.

Mr. SMITH: That is all supposition on your part, isn't it, Mr. Earnest?

99 WITNESS: Sir?

Mr. SMITH: You said you supposed so, I believe?

WITNESS: Yes, sir; I suppose so.

The defendant company, by its counsel, objects to witness giving as evidence any suppositions.

The plaintiff, by his counsel, replies by saying he will cover this question by developing it further.

Mr. MOORE, of counsel for plaintiff, resuming direct examination:

Q. I will ask you if these coal cars could go east from North Fork without traveling into Virginia?

A. No, sir.

Q. Could they come from the east for any distance without traveling through Virginia and get to North Fork?

A. No, sir.

Q. Mr. Earnest, what was the signal that you were to give the engineer to go ahead at those switches, or to come forward?

A. A signal like that. (Indicating by holding hand above head and waving parallel with track.)

Q. A signal up and down?

A. Yes, sir; like that.

Q. And what was the signal to stop?

A. Across the track, that way. (Indicating.)

Q. The only signal then that you gave him to come forward was after fixing switch No. 3?

A. Yes, sir; that was the only signal I gave him.

100 Q. Mr. Earnest, what was your health prior to the time when you received this injury?

A. My health was good. I was never sick in my life only I had the measles. That was the worst sickness I ever had. The only time I ever had a doctor come to see me was when I had the measles.



Q. Mr. Earnest, are you an educated man?

A. No, sir; I haven't got any education to amount to anything at all. I can read and write a little, but that is about all.

Q. So then you are dependent upon manual labor, are you?

A. Yes, sir.

Q. And if you don't find some kind of work to do you have no way of making a living by any profession or business or anything of that kind?

A. No sir.

Q. Well, can you explain the difficulties of your firing with one leg gone, and of being an engineer with one leg gone. Do you know of any firemen or engineers working for the Norfolk & Western Railway with a whole leg gone, like you have gone, leg above the knee?

A. No, sir; I don't know of any.

Q. You don't know of any in either position in the employment of the company?

A. No sir.

Q. Do you know of any with a leg gone as yours is in the employment of any company as fireman or engineer?

101 A. No, sir; I don't.

Q. Witness is with you, gentlemen.

Cross-examination.

By Mr. SMITH:

Q. Mr. Earnest, I believe you stated that you were 23 years old at the time you were hurt.

A. Yes, sir.

Q. What was the date of your birth?

A. I was born in 1886 I think.

Q. 1886?

A. Yes.

Q. What time in 1886?

A. April 23, 1886.

Q. When did you go to work for the Norfolk & Western Railway Company?

A. Went to work for them in June 1905, 13th day of June.

Q. Did you make application to the company in writing?

A. Yes, sir.

Q. Did you sign it?

A. Yes, I suppose I did.

Q. Is this your application, Mr. Earnest?

A. Yes, sir; I suppose it is.

Q. Is there any doubt about this being your application?

A. No, I don't suppose there is. I guess that is it.

102 Q. Is that your signature to that application?

A. Yes, that looks a little like it, here.

Q. Isn't this your handwriting all through this application. Didn't you write that?

A. I didn't write that right there.

Q. You didn't write your name at the top?

A. No, sir.

Q. Didn't you write the balance of it?

A. Yes, sir; I think I did.

The defendant, by its counsel, offers the application for employment of plaintiff in evidence, reads same to the jury, and, for the purpose of identification, it is marked,—

“DEFENDANT'S EXHIBIT A.”

Form C. T. 88.

“Norfolk & Western Railway Company.

JUNE 5, 1905.

*Record of R. E. Earnest, Who Makes Application for Service as Fireman.*

1. Full Name?

David Emory Earnest.

2. Born?

City or town, Seven Mile Ford. State: Virginia. Month: April.  
Day 23, year 1883.

3. Height and weight?

Height 5 feet 7 inches. Weight 160 pounds.

4. Married or single?

Single.

5. Name and residence of nearest relative?

David M. Earnest, Seven Mile Ford, Va.

6. State of health?

Good.

7. State if insured; in what companies, and for what amount.

No.

8. State experience (if any) in railroad service other than  
103 this road, giving capacity of service, time and with what road.

Brakeman on Climax engine for Crosby and Beckley Lumber Co.

9. State if discharged from service as above, cause and from what road.

No.

10. State where last employed, capacity and cause for leaving.

Crosby & Beckley Lumber Co. Brakeman on Climax engine.  
They finished up.

11. Give names and addresses of persons to whom you refer.

Lee McChesney, Bristol, Va.

12. Were you ever employed by this road? When, and in what capacity.

No.

13. Were you ever discharged from this road? For what cause and when?

No.

14. Will you study the rules governing employes on this road carefully, keep posted, and obey them?

Yes.

15. Will you inform yourself as to the location of bulletin boards, books, etc., regularly read the special notices, orders and instructions posted thereon or contained therein, and comply with same?

Yes.

16. Do you know that bridges, including highway bridges and tunnels, on this line are too low to clear a man standing on a car?

Yes.

17. Do you know that there is not room in tunnels and bridges to climb up or down the sides of a car while trains are in motion and do it safely?

Yes.

18. Will you abstain from the use of intoxicating drinks while in the services of the company.

Yes.

19. Will you keep away from places where it is sold, and lend your influence to help others to do the same?

Yes.

104 20. Do you understand that, unless you use constant care to avoid damage to the company's property, and personal injury to yourself, the position you are applying for is one of a hazardous and dangerous nature?

Yes.

21. Will you promptly inform yourself as to the location of all structures, or objects, along the line which you are employed or working on, that may be near to the tracks, engines or cars, and not put yourself in a position to be injured by same?

Yes.

Witness:

G. J. STONE.

Signature:

D. E. EARNEST.

(Endorsements on back:) Norfolk & Western Railway Co. Record of employe. No. —. Assigned to duty as fireman this 19th day of June 1905 4:30 p. m.

Name: D. E. Earnest.

Residence: Seven Mile Ford, Va.

Occupation: Fireman.

Date: June 5, 1905.

Passed satisfactory examination this 19th day of June 1905 on duties of fireman.

JOHN CULLINEY,

R. F. E.

Approved:

A. KEARNEY,

A. Sup't M. P.

June 9, 1905.

105 Q. Who was Mr. Stone?

A. He was Road Foreman of Engines on the Radford Division.

Q. When you made that application you stated that you were born in 1883. Why do you state now that you were born in 1886?

A. I was away from home, and wanted to get a job, and had to do it to get a job. If I hadn't done it they wouldn't have hired me.

Q. You don't mean to tell this jury that you started in to work for the company by telling a lie?

A. I told them that to get a job.

Q. Is that a justification of lying?

A. I suppose so, if you wanted to get a job it was.

Q. Then it would be justification to lie to get a verdict here, wouldn't it?

A. I wouldn't do that.

Q. Oh! you wouldn't?

A. No, sir.

Q. You would lie to get a job, but to get a \$20,000 verdict you wouldn't lie?

A. No, sir; I wouldn't.

Q. Well now, Mr. Earnest, you say Mr. Drawbond did not come there in time to fix up his engine and get it ready to start?

A. No, sir; he didn't.

Q. And you fixed it up, fixed up everything for him?

106 A. Yes, sir.

Q. And he didn't have anything to do after he got there except to get on his engine and start out?

A. That is all.

Q. When he started out all he had to do was to start the lubricator?

A. Yes, sir.

Q. When he started the lubricator you say he had to pay some attention to the glass indicator?

A. Yes, sir.

Q. That indicated whether oil was lubricating the engine properly? That is what those glass tops were for, weren't they?

A. Yes, sir.

Q. You say he had to notice that very closely and carefully?

A. Yes, sir.

Q. Why?

A. So you wouldn't feed oil too fast and run out before your day was up, or so you wouldn't have to make an excess oil ticket.

Q. Why would he have to notice it so closely?

A. To keep it from feeding too fast, and to see that it was feeding fast enough.

Q. Would he have to notice closely to be able to see it?

A. Yes, sir. Sometimes you couldn't see it very well and would have to look very close.

107 Q. Well, if these glass tops were kept perfectly clean he could see very well?

A. Yes, sir; if kept perfectly clean he could.

Q. Whose business was it to keep them perfectly clean?

A. The roundhouse men I suppose.

Q. Didn't you have anything to do with that?

A. I had to wipe off on the outside.

Q. Didn't anybody wipe them off on the inside?

A. They would get dirty in there and they would clean them out on the inside.

Q. Wasn't clean oil used in them?

A. What kind of oil?

Q. Clean oil. They didn't use dirty oil, did they?

A. I suppose not. They filled them up at the roundhouse.

Q. Couldn't anything get in there except it was put in there?

A. Well, oil would get in the glass and get them black inside so you couldn't see through them good.

Q. You started out and went to the first switch. How did you proceed from the engine to the first switch?

A. I jumped off the engine on the left side and ran to the first switch and throwed it, and crossed over and signalled him ahead, over that switch.

Q. How did you go to the first switch?

A. I jumped off on the left side and ran up to the first  
108 switch. I don't know exactly what course I took; don't remember. I remember that I went to the switch the best way I could get there, and the quickest way to throw it over.

Q. If you jumped off the left side of engine and went the nearest way to the switch you didn't go on the track at all, did you?

A. I don't remember whether it would have been any nearer to get on the track or not, don't think it would.

Q. Wasn't it a comparatively straight track, or a straight track at that point?

A. It was a straight track up to the switch, and then beyond the switch it kinder curved around a little bit to the right. Up to the switch you first went to it was a straight track.

Q. Up to the switch you first went to it was a straight track?

A. Yes, sir.

Q. An you got off on the left side of the engine and went directly up to that switch bar?

A. Yes, sir. I might have jumped off in the lead right where it was smooth and all, and run up the lead to the first switch.

Q. When you got to the switch bar what did you do?

A. I throwed the switch and crossed over the switch and waved him ahead.

Q. When you got to the switch bar you went immediately to the bar, did you?

A. Yes, sir.

109 Q. Is that what you call it, the switch bar?

A. That is a switch bar. I went immediately to that and don't remember whether I looked at it first or at the needle points. It seems to me that I looked at the needle point first, think I did.

Q. You think you did? You are thinking about that?

A. I ain't positive but that is the way I always done, because I could see them better.

Q. With your torch and light reflecting along the rail, shining along the rail, couldn't you see the switch bar before you got to the switch?

A. No, sir; not to do any good.

Q. Couldn't you see whether it was open or not, and go right immediately to the lever and throw the lever without going to the needle point?

A. No, sir; it wasn't shining that well, to see good.

Q. What kind of torch did you have?

A. I had a copper torch.

Q. Was it burning all right?

A. Yes, sir.

Q. A torch you were in the habit of using?

A. Yes, sir.

Q. You made it yourself?

A. No, sir.

Q. You went and threw the switch, and then you say you crossed over and motioned him ahead. Why did you cross over?

A. I crossed over there so he could see me well.

110 Q. Couldn't he see you at the switch?

A. Why, he could if he had been looking out good, but I thought I would cross over and give him a good advantage to see me, where he could see me plain.

Q. What would obstruct him from seeing you on the side next to the switch bar if he could see you on the other side. Wa'n't it practically the same distance from him?

A. Yes, just about the same distance, but I crossed over so he could see me better over there. He could see me from that side, or the other side.

Q. He could see you from either side?

A. Yes, sir.

Q. How could he see you better over there?

A. Well, because it was right straight out, and if he hadn't been looking out of the window, or hadn't had his head sticking out of the window, he might not have seen me.

Q. Couldn't you see him?

A. When I crossed over I could see him good.

Q. Couldn't you see him before you crossed over?

A. Well, yes, I could see him if he had been standing with his head out of the window.

Q. Well, do you remember whether you crossed over or not?

A. Yes, sir.

Q. Why did you remember that so particularly?

A. Because I crossed over so I could wave him ahead.

Q. How is that?

A. I crossed over so I could wave him ahead.

111 Q. Couldn't you have waved him ahead just as well from the switch bar as you could if you crossed over?

A. Not so well.

Q. Was he standing still when you waved him ahead or coming on?

A. He was coming on slowly.

Q. If he was coming on slowly what do you mean by waving him ahead?

A. So he would know the switch was all right or he might have stopped. He usually did if I didn't wave him ahead. I waved him ahead so he would know I had the switch fixed for him.

Q. He could see you when you fixed the switch?

A. See me?

Q. If you did nothing to that switch couldn't he see you from where he was?

A. Yes, I guess he could, but possibly I couldn't have get the switch fixed all right, and he wouldn't know whether to come on over it or not until I gave him signal. There might have been something the matter with the switch.

Q. You threw the switch and gave the signal?

A. Yes, sir.

Q. And that signal was to come ahead?

A. Yes, sir.

Q. What did you do?

A. Got in the track and went on up to the other switch to examine it.

112 Q. You got in between the track?

A. Yes, sir.

Q. And went on up to the other switch to examine that?

A. Yes, sir.

Q. You got in between the rails?

A. Yes, sir.

Q. You remember that?

A. Yes, sir.

Q. How did you proceed?

A. I went kinder in a trot, a little faster than a walk, so as I might get out of the way of the engine, so I could increase speed on the engine and be plenty ahead of it so as I would have plenty of time to fix my switch.

Q. You were in between the tracks and had a torch in your hand?

A. Yes, sir.

Q. When you got over to the switch what did you have to do to see whether it was right?

A. I had to examine the switch.

Q. How did you examine it?

A. Had to look down at the needle point to see whether it was right or not.

Q. How did you know by looking down at the needle point?

A. To see which way the switch was thrown.

Q. How did you have to do that?

A. Had to put my torch down that way (indicating) to see it good.

113 Q. Do you mean that you had to put your torch down near the rail?

A. Yes, sir; to see it good.



Q. You couldn't see that rail without putting your torch down near it?

A. Not well, no sir.

Q. How long did you have to stop there to do that?

A. I didn't stop at all; just kinder throwed my light down there at this switch. I remember just throwing my light down there, and I was caught right at that time it seemed like.

Q. Which way were you facing when you were caught?

A. I was coming east.

Q. You were coming east?

A. Yes, sir.

Q. And you were facing east?

A. Yes, sir.

Q. How were you caught?

A. I don't know how I was caught for sure. I couldn't tell.

Q. You couldn't tell?

A. No, sir.

Q. Were you right between the rails, right in the centre of the track between the rails?

A. Just about it. I might have been not just exactly in the centre. I was between the tracks but don't know exactly whereabouts though.

Q. And facing east?

114 A. Yes, sir.

Q. And facing directly the way the track was running?

A. Yes, sir.

Q. Had you ever looked back from the time you started from the first switch?

A. After I waved him ahead at switch No. 3 I didn't look back any more until the engine caught me.

Q. You hadn't looked back any more until the engine caught you?

A. No, sir.

Q. After you waved him ahead at switch No. 3 you never had looked back until the engine caught you?

A. No, sir.

Q. You say another train was passing there?

A. Yes, sir.

Q. At what time did you wave at that fireman on the other train?

A. At what time?

Q. Yes, where were you then?

A. It was just before I set switch No. 3, or just afterwards and I don't remember which it was. It was right about switch No. 3 somewhere, and I don't remember.

Q. It was just before or just after you set switch No. 3?

A. Yes, sir.

Q. Well then, the train was passing along, wasn't it?

A. Yes, sir.

Q. Your brother was on that train, wasn't he?

115 A. Why yes, he was on it.

Q. Where was he on it?

A. He was on the rear end of it.

Q. What was he doing on there?

A. He was firing the pusher on the rear.

Q. Did you know that then?

A. No, sir; I didn't know he was on it.

Q. You didn't know he was on it?

A. No, sir.

Q. Did you know what service he was in?

A. Yes, sir.

Q. Was he in the pusher service pushing trains along there at North Fork?

A. Yes, sir.

Q. Did you know that he might be on it?

A. No, sir; I didn't know whether he was on it or not.

Q. Didn't you expect him to be on it?

A. No, sir; I didn't think anything about him being on it that I remember of.

Q. Didn't you want to find out or see whether he was on it or not?

A. No, sir; I didn't make any attempt to find out or to see.

Q. Wa-n't you noticing this train as it passed?

A. No, sir; I didn't do anything, only to kinder throw my torch up and speak to the fireman as I ran along to the other switch, or just before I throwed switch No. 3, and I don't remember  
116 which. Just about the time I was at switch No. 3 I throwed up my torch and spoke to the fireman on the head end, and that was all I done.

Q. Was there more than one engine on the head end?

A. No, sir; that is all.

Q. The fireman you motioned at was on an engine on the head end?

A. Yes, sir.

Q. And your brother was a fireman on the engine on the rear end of the train?

A. Yes, he was on the rear end of the train.

Q. You said you could not tell after the train struck you much about what happened, I believe?

A. Not so very much.

Q. What is that?

A. No, I couldn't tell so very much.

Q. What rail did you fall across?

A. I fell to the right side.

Q. You fell to the right side?

A. Yes, sir; I fell across the right rail.

Q. How did you fall, face foremost or how?

A. I don't know how I fell. I don't know which way I fell, and don't remember anything about that at all.

Q. You don't remember whether you fell face foremost or backwards?

A. No, sir; I don't remember.

Q. But you did fall to the right side?

117 A. Yes, I was on the right side when they found me, and I supposed I fell over there. I couldn't have been over there unless I did.

Q. When did you halloa?

A. I halloaed immediately after I fell. It seemed like I halloaed just as soon as I discovered there was something wrong, but I didn't hardly know where I was at, it frightened me so. It seemed kinder like a dream to me. I didn't hardly know where I was at until the engine stopped.

Q. You halloaed immediately you think?

A. Yes, sir; that is the best of my knowledge, I think I halloed immediately after it struck me.

Q. Did you holloa loud?

A. I holloaed as loud as I could.

Q. You think you holloaed three times?

A. As well as I can remember I halloaed three times.

Q. When the engine stopped did you see what wheel was on your foot?

A. Yes, sir.

Q. What wheel was it?

A. It was the pony truck wheel.

Q. Is that the front wheel on the engine?

A. Yes, sir.

Q. What kind of wheel is that?

A. It is a small wheel.

Q. It is a small wheel?

A. Yes, sir.

Q. It wasn't one of those big heavy drivers that got on  
118 you, was it?

A. No, not that I remember of. If it did I didn't know anything about it.

Q. You saw that foot when it was under that pony truck wheel?

A. I saw this foot (left), I didn't see this one (right).

Q. Yes, but when the engine stopped the pony truck wheel was on your left heel?

A. Yes, sir.

Q. Couldn't one of the big drivers have gotten over the other one, could it? How far was the big driver behind the pony truck?

A. I don't know how far.

Q. More than your length, isn't it?

A. No, sir; I don't suppose it was.

Q. You don't know the distance?

A. No, sir; I don't have any idea of that distance.

Q. There is only one of those small wheels there, isn't there?

A. Yes, sir; at that place only one.

Q. If that wheel had gone over one leg and was resting on the heel of the other it could not very well have gotten over your leg that was cut off, could it?

A. I don't know whether it could or not. I don't hardly know how that would be. I don't think there was any wheel that run over me but the pony truck wheel. They all said there was nothing that run over me but the pony truck wheel.

119 Mr. MOORE: What others said to you is not evidence. Mr. Smith is asking you to tell what you know.

Mr. SMITH, resuming cross-examination:

Q. I am asking you for what you know. You were not knocked down in the middle of the track?

A. Not as I remember of. I don't remember whether I was knocked down or how it was done at all. I don't remember how I got under there. The last thing I can remember is I was looking at the switch.

Q. What were you looking at?

A. I was looking at the needle points of the switch.

Q. How far was the needle point of the switch?

A. When I was looking at it?

Q. Yes.

A. Not very far, something like about out there to that stage.

Q. Right opposite you?

A. Well, it was in front of me. The needle points was in front of me, and I was in the middle of the track. Like this was the track and I was in the middle, there was a needle point on this side and one on the other side, in front of me.

Q. Were you even with the needle points?

A. No, I wasn't quite up to them yet. I was down where I could see them good. I kinder threw my light down before I got right at them so I could tell before I got right at them.

120 Q. You stated on your examination-in-chief that it was supposed you stepped in a hole and fell down, or something of that sort, didn't you?

A. Yes, sir.

Q. What sort of hole did you have reference to?

A. It was a hole at the switch where they cleaned out for the switch to work clear, so that the switch could work good.

Q. Well, that is what they call the bridle of the switch, isn't it, bars that work across the track from one rail to the other?

A. I suppose it is. I don't know what the name of that is.

Q. It is a bar of iron that runs from one rail to the other?

A. Yes, sir; it runs from one needle point to the other.

Q. Is that the rail that moves the switch when you throw the lever on the outside?

A. Yes, sir.

Q. That is the bar that moves the switch?

A. Yes, sir.

Q. That works in between the cross-ties, doesn't it?

A. Yes, sir; works kinder in between the cross-ties.

Q. Isn't it necessary to keep that cleaned out so as to let that bar work right?

A. Yes, sir; it is necessary to keep it cleaned out so it can work good.

121 Q. It was supposed that you stepped into that, was it?

A. Yes.

The plaintiff, by his counsel, objects to counsel for defendant attempting to have the witness state an opinion expressed by some one else.

Q. Did you notice that place that night yourself?

A. Yes, sir.

Q. You did?

A. Yes, sir; I noticed it.

Q. Did you step into it?

A. I don't remember whether I did or not. If I stepped in it I don't have any recollection of it.

Q. When did you notice it that night?

A. I noticed it as I stepped up there with a torch. I noticed the hole there.

Q. You do not want to make the impression on the jury that there was a hole dug down there, do you?

A. No, sir; only for these bridles or whatever they are called to work in that connect the needle points.

Q. What you call a hole is the place that they keep cleaned out between the ties so that bar can work?

A. Yes, sir.

Q. Want the place kept clear of dirt from one rail to the other so as it would work?

A. Yes, sir.

Q. It was necessary to do that, wa-n't it?

A. Yes, sir; I suppose so.

122 Q. If dirt got up between the needle points could the switch work?

A. No, sir; the bridle could not work good with dirt in there against it.

Q. When you would throw that switch in the yard there you say there was a bar that laid down on the ground?

A. Yes, sir.

Q. When you would throw it what did you have to do?

A. I had to catch hold of it and throw it over.

Q. Look at this pencil. When you picked it up did you just have to take it up and lay it down on the other side as I am indicating with this pencil?

A. Yes, sir.

Q. That is the way that switch worked?

A. Yes, sir.

Q. When you picked it up here and pulled it over and laid it down on the other side that would then change that switch?

A. Yes, sir; it would either work that way, towards the rail, or up by the side of the rail. I don't remember now which way it worked, but think it worked towards the rail.

Q. You think all those switches along there worked towards the rail?

A. Yes, I believe that is the way they worked, but I ain't sure about that.

Q. You are not sure about that?

A. No, sir.

123 Q. You are not certain whether they worked towards the rail or not?

A. No, sir.

Q. Some of those worked by turning a bar over towards the rail to change the switch, and then to turn it back turn it away from the switch?

A. Yes, sir.

Q. And then some ran parallel with the rail?

A. Yes, sir; I think they did. I don't know whether they did along there or not. I think——

Q. I am not talking about——

Mr. MOORE: Let the witness finish his answer.

Mr. SMITH: All right. I thought he had finished.

A. Along there the most of them worked just alike, right along there. I think one, two, three and four switches however many there was, worked just about alike.

Q. The switch at No. 3, did that turn over in the direction that the rail ran, or did it turn over towards the rail or away from the rail?

A. I don't know which way, don't remember how that was.

Q. The switch at No. 2, about that?

A. They all worked just about alike. I disremember now how they did work.

Q. Suppose you went to turn over the switch bar and there was some dirt in them between the needle points and the rail, could you undertake to turn the switch over then?

124 A. No, sir; if there was anything in the way that would catch the needle points you couldn't.

Q. If there was anything in the way to catch the needle points you couldn't turn it?

A. No, sir.

Q. So that if the bar which you lift to change the switch was lying flat on the ground you would know that the switch was either closed or open?

A. Yes, sir; I would know it would be either closed or open.

Q. If you found it was closed and you wanted to open it, or if you found it open and wanted to close it, you would take hold of the bar and lay it right over on the ground on the other side?

A. Yes, sir.

Q. And then you would know it was changed from what it was before?

A. Yes, sir.

Q. At what time were you called to be ready?

A. Sir?

Q. At what time were you called to be ready that night?

A. To report at eleven o'clock.

Q. You were to report at eleven o'clock?

A. Yes, sir.

Q. Were you told at what time to be ready?

A. You are supposed to be ready to leave the spur track in the yard at fifteen minutes after eleven.

125 Q. At fifteen minutes after eleven?

A. Yes, sir; at eleven-fifteen.

Q. Well, you said you had been in this pusher service there this time previous to the time you were injured, nine days I believe?

A. The last time yes sir.

Q. Who had you been firing for the last time?

A. Mr. John Drawbond.

Q. Well, you said you had been in pusher service there before?

A. Yes, sir.

Q. How long were you in it before?

A. I don't remember how long I was in it before.

Q. How long did you think you were in it before?

A. I don't have much idea, possibly six or eight months, or maybe longer than that. I don't remember how long.

Q. Who did you fire for during the time you were in it before?

A. I fired for Ray Gardner the most of the time, and I don't remember whether I had any other engineer or not. That was when I first went to firing. And, let's see, I fired for John Bowden—

Q. Who?

A. For Lee Thompson, I fired for him a little bit, and then for John Bowden, who got the run.

Q. Did you fire for all these men on that pusher service  
126 from North Fork east?

A. Yes, sir.

Q. But you mentioned one you thought you had fired for mostly. Who was he?

A. Ray Gardner I think was the fellow I fired for longest.

Q. Did you fire for John Drawbond any before that period of nine days just before you were hurt?

A. I don't remember whether I did or not. Don't remember whether I had fired for him or not. I think I did though maybe, a trip or two.

Q. A trip or two?

A. Yes, sir; but never had him for regular pusher that I remember of.

Q. Hadn't you been firing for him all during January?

A. No, sir; I never went to firing for him until the 5th of February. No, I didn't fire for him in January.

Q. Who did you fire for in January?

A. I fired for Enick part of the time. I don't know how you spell his name.

Q. What service was that?

A. Shifter in North Fork yard, to deliver empties up North Fork hollow.

Q. Shifter in the yard?

A. Yes, sir; it was a shifter in the coal field, they call them, to distribute cars. They just worked around there in the coal field.

Q. What was the name of that fellow?

127 A. Enick or something of the kind. I don't know how you spell his name.

Q. Did you get off the engine to go up there to switch No. 3 before the engine started or after it started?

A. Just immediately when it started I jumped off right then,



when he first started, and run around to switch No. 3, just after he started.

Q. Where did he start from?

A. He started from down on No. 3.

Q. How far down on No. 3?

A. Well, I don't know, about one hundred feet maybe or something like that, or a little more.

Q. Was there a coal wharf down there?

A. Yes, sir.

Q. How far was it from the coal wharf?

A. I don't remember now how far it was.

Q. Wasn't he just under the edge of the coal wharf?

A. I don't remember about that.

Q. Why did you wave at the fireman on train #82 if you didn't think he saw you?

A. I waved right about switch No. 3, and he——

Q. (Interrupting.) I ask, why did you do it if you didn't think he saw you?

A. Well, he was standing in the door, and I just supposed he was looking over that way, and I throwed my torch up.

Q. In testifying in chief you said that when you were hurt you asked where your brother was and he was going over the hill?

A. Yes, sir.

Q. You meant by that that he was on the pusher engine that was on the train you were expected to push, and that that train had gone on, and he was in that service, pushing the train, and he was firing the engine that was pushing that train, didn't you?

A. Yes, sir; I suppose he was in that, because they told me—well, I believe they told me.

Q. I wasn't asking you for anything they told you. Were you telling what they told you when you said that in chief?

A. When did I what?

Q. When you were examined by Mr. Moore, your counsel, you were not testifying to what they told you, were you? You said your brother was going over the hill at the time.

A. Yes, I was telling what they told me, that I had heard.

Q. You said that he was going over the hill?

A. Well, that is the reason I knowed it. Mr. Drawbond or some one if I ain't mistaken said he was firing the engine that went over the hill that was pushing the train that we was to push. That is the reason why I said that. I don't know whether he was or not.

Q. Didn't you say you told Drawbond to tell your brother if you didn't see him to stop firing?

A. Told what?

129 Q. I understood you to tell the jury that you told Drawbond to ask your brother if you didn't live to see him to stop firing?

A. Yes.

Q. You told Drawbond where your brother was, didn't you?

A. Not as I remember of. I don't remember telling him anything about where he was because I didn't know.

Q. You do remember telling him that?

A. Yes, sir; I do remember telling him that I think.

Q. What word did you send your brother, or what did you tell him to tell your brother?

A. I don't remember what all. I told him to get him to quit firing, and I don't remember what all I did tell him to tell him. I disremember what it was.

Q. Your leg has healed up well, the stub, hasn't it?

A. Yes, sir; it has healed up all right.

Q. The operation was a successful operation?

A. I suppose so. I don't suppose the operation would have anything to do with the hurting, but I don't know about that.

Q. Now about wages: You told the jury that you thought the highest wages you made was \$97.00 a month. Do you remember what was the lowest wage you ever made?

A. No, sir; I don't remember the lowest wages I ever made. The lowest wages I ever made was in 1908; and I don't remember how low that was.

Q. Well, you were paid by the trips you made, were you not, Mr. Earnest?

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A. I was paid by the day, \$2.55 a day and 27¢ per hour overtime I think was the wages I was getting.

Q. Well, they paid you so much a day, and they counted a day so many hours?

A. Yes, sir.

Q. How many hours?

A. Ten hours on those runs.

Q. And over time they gave you 27 cents an hour for?

A. I think that was the overtime rate.

Q. Your wage would depend on the time you were employed?

A. My wages?

Q. Yes.

A. Yes, sir.

Q. And in the railroad service they can't always keep all of the men employed, isn't that true? Didn't you say there had been some dull times when they didn't have all of the men employed?

A. Oh, yes, in dull times they had to cut off some of them.

Q. And those that remained did not work as much as they had?

A. No, sir.

Q. What was your average wage along in the dull times?

A. Well, I don't hardly know. I don't have any idea what I did make along in there. Some months I made pretty good money, and some months I didn't make anything much.

Q. Some months you hardly made anything?

A. I didn't make so very much, no.

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Q. That is usual in the railroad service. That is usual in the nature of things. They have to keep men so that when they have plenty of work they can do it, and when work gets slack

some of those men have to be laid off and so then don't work so much time. That is bound to be so, isn't it?

A. Yes, sir; I guess they have to keep more than they need.

Q. Your health since your limb has been cut off has been good, hasn't it?

A. Yes, I am hearty to eat. I can eat tolerable hearty, but am not as stout as I was before. I am nervous——

Q. You don't get quite as much exercise now as you did before?

Mr. MOORE: The witness had not finished his answer when you interrupted him with another question.

A. I am nervous, and at times I can't eat as much as I did before I was hurt. I don't weigh as much as I did.

Q. I believe you said you had made application for employment to the Norfolk & Western Railway Company since you were hurt, didn't you?

A. Yes, sir.

Q. When did you make that application?

A. I didn't make application, I only asked for it.

Q. That is what I mean.

A. Well, I didn't make it in writing.

Q. You went to see somebody to see if you could get work?

132 A. Yes, sir.

Q. Who did you go to see?

A. I went and asked the train master about it, and told him I wanted to get a job.

Q. What train master?

A. I forget the man's name now. He hadn't been train master very long when I was there.

Q. Where was he?

A. At Bluefield.

Q. Did he have charge of the business at Bluefield or where?

A. He had charge——

Q. Of Bluefield yard?

A. No, sir; he had charge of the Pocahontas division I think now was where he worked.

Q. Well, what did he say?

A. He said he thought they could find work for me. Then I went up to see Mr. Becker. I think possibly he told me to do it, and Mr. Becker wasn't in, and I went up there and told his clerk I wanted to get a job, and he said he would take the matter up with Mr. Battle.

Q. Well, they didn't turn you down?

A. No, sir; not then. They never turned me down but said——

Q. They never turned you down and you never had been turned down when you brought suit?

A. They said they would give me a job and never did  
133 let me know, and sent me a release to sign before I brought suit.

Q. Sent you a release to sign?

A. Yes, sir; before I brought suit. I just supposed by that that

they wanted me to sign a release and wasn't aiming to give me any job.

Q. And wa'n't going to give you any job?

A. Yes, sir.

Q. Well, it seems to me I would have supposed they were going to give me a job if they asked me to sign a release?

A. They told me to sign it and mail it back to them and never said anything about the job.

Q. At the same time you went there and asked for a job, at the superintendent's office, at Mr. Becker's office, didn't you talk to Mr. Worley? Isn't he the man you spoke of?

A. Yes, sir; he is the fellow I think.

Q. He is the fellow?

A. Yes, sir; he is the clerk I think.

Q. You told him you would like to have a job?

A. Yes, sir.

Q. And he gave you some encouragement, didn't he?

A. Yes, sir; he talked like he might do something.

Q. Did you tell him you would like to have something else?

A. I don't remember whether I did or not. I told the train master I wanted to see about getting a job, to see what they  
134 could do for me.

Q. Did you tell Mr. Worley you wanted to see about anything but a job?

A. I don't remember whether I did or not.

Q. Didn't you tell him you wanted to see about getting a wooden leg?

A. I don't remember what was said about that now.

Q. Didn't you ask Mr. Worley to ask the company to get you a wooden leg?

A. I don't remember but might have done it, but wouldn't say whether I did or not.

Q. Didn't they get you a wooden leg?

A. Yes, sir.

Q. How come them to do it?

A. Well, they took matter up with Mr. Battle I suppose.

Q. Didn't you ask the company to give you a job, and didn't you ask them to give you a wooden leg too at that same time? Wasn't that the first that was ever said to the company about a wooden leg?

A. I don't remember when I did. Possibly I did ask him something about a wooden leg.

Q. Didn't the company give you a pass to go to Washington on to get the leg fitted?

A. Yes, sir.

Q. Had you ever said anything about bringing suit up to that time?

A. No, sir.

Q. When did you go to Washington?

135 A. I went to Washington in June or July, I forget which it was

Q. When?

A. In June or July.

Q. You went there in June or July?

A. Yes, sir.

Q. Wa'n't it August when you went there?

A. I don't know for sure when it was now that I went. I forget, but it was during a hot month that I went.

Q. They hadn't told you that they were going to turn you down for a job, and at the same time you asked for a job you asked for a wooden leg, and you got the wooden leg?

A. I don't remember whether I asked for a wooden leg then or not.

Q. You hadn't made up your mind to sue then when you asked for the wooden leg?

A. No, sir.

Q. When did you make up your mind to sue?

A. I don't know when I asked them for the wooden leg.

Q. When did you make up your mind to sue the company?

A. When they sent me the release to sign.

Q. When did they send you the release to sign?

A. It was some time after I came back to Washington city.

Q. After you came back from Washington city?

A. Yes, sir.

Q. Didn't you go to see a lawyer in Washington city about suing the company?

136 A. I went and consulted him about it, yes sir.

Q. At the very time you went up there on a pass the company gave you to get a wooden leg?

A. Yes, sir.

Q. Didn't you come to an agreement with reference to suing the company while you were up at Washington?

A. I told him if they didn't do something for me I would give him the case.

Q. Didn't you sign an agreement while in Washington?

A. Well, I signed the agreement, but told him not to do anything with it until he heard further from me.

Q. The company never had asked you for a release then?

A. No, sir; not until I came back from Washington city.

Q. When the company sent you the release what reply did you make to them.

A. I told them that I had placed my matter in the hands of Pack, Hinton & Pack, Washington, D. C.

Q. And that they would have to confer with them?

A. Yes, sir.

Q. Then the matter of their employment of you ended?

A. Yes, sir; they had sent me a release, and I supposed that was all they aimed to do for me, and that I would have to try to get something else, as I couldn't get along without it.

137 Q. You didn't expect them to employ you then with you suing them, did you?

A. No, sir.

And the hour for dinner recess being reached before the conclusion of this witness' testimony a recess was taken until 2:00 p. m.

SATURDAY, *June 25, 1910.*

## Afternoon Session.

Court reconvened at 2:00 p. m. pursuant to recess.

D. E. EARNEST, the Plaintiff, resumes the stand on cross-examination from morning session.

By Mr. SMITH:

Q. Mr. Earnest, it was Mr. Worley that you saw at the superintendent's office in Bluefield, wasn't it?

A. Yes, sir.

Q. Didn't Mr. Worley tell you he was going to look out for a job for you?

A. Yes, sir.

Q. Didn't he tell you also to look around and see if you could find something that would suit you and let him know?

A. I don't remember about that, whether he did or not.

Q. Mr. Worley had never told you then that he wasn't going to give you a job?

A. That he wasn't going to give me anything?

Q. Yes.

A. No, sir he did not,; and I thought maybe he talked to me like he would give me a job.

Q. That is all.

139 Re-examination.

By Mr. MOORE:

Q. Well, as a matter of fact did they ever give you a job?

A. No, sir.

Q. How long did you wait on them to get them to give you a job?

A. I waited until they sent me a release. I don't know just how long it was now. I disremember when that release was sent to me.

Q. When they asked you to sign and execute a release you instructed your attorneys to bring suit?

A. Yes, sir.

Q. You first made a contract, as I understood you to say to Mr. Smith, with your attorneys to sue in the event you were forced to do so?

A. Yes.

The defendant company, by its counsel, objects to anything with reference to the contract of employment of attorneys by plaintiff unless that paper itself is presented.

Objection sustained.

Q. What instruction did you give your attorneys about suing in event you could not settle the case?

Mr. SMITH: We object to this.

The COURT: I can see some circumstances under which this would

be proper. If you wish to do so you may develop the relevancy of the question.

140 Mr. SMITH: Mr. Earnest, did your contract provide any conditions?

WITNESS: Any conditions?

Q. Yes, were there any conditions in your contract?

The COURT: You are now asking the witness as to the contents of the contract.

Mr. SMITH: Was the contract in writing?

WITNESS: Yes, sir.

Q. Was it a contract employing these gentlemen to bring suit?

A. Yes, sir; if I didn't get something out of the company. I told them to wait to see what they would do before they did.

Mr. MOORE, resuming re-examination:

Q. What was that answer? You told your attorneys to wait on you for what?

A. I told them to wait until I found out and seen what the company was going to do.

Q. After you waited and found out what the company was going to do what did you tell your attorneys to do?

A. I told them to go ahead and bring suit after they sent me that release.

Q. You referred to Mr. Battle: Who is he?

A. He is the claim agent I suppose.

Q. Of what?

A. Of the Norfolk & Western Railway.

Q. You told Mr. Smith that you waved at some man on  
141 the passing train just before you got to No. 3 switch or just afterwards. Did that man seem to know you or anything of that kind?

A. No, sir. He would have knowed me if he had saw me, but I am not sure whether he saw me or not, and don't think he did. I don't remember of him speaking to me if he did see me.

Q. Was that a train signal that you were giving to him?

A. No, sir; I just throwed up my hand speaking to him like.

Q. Did you have to stop or do anything to interfere with your work in any way to wave at this gentleman who was passing?

A. No, sir.

Q. Was that bound to interfere with your work?

A. No, sir.

Q. Have you regular fixed train signals, certain movements or directions or anything of that kind, so that you men who operate trains understand what they mean?

A. Yes, sir.

Q. How are those train signals prescribed?

A. A light moved up and down, like that, or your hand, is to come ahead, and waved across the track, like that, is to stop a train.

Q. Do you remember whether they are prescribed by the book of rules?



A. Yes, sir.

142 Q. Now, you were telling Mr. Smith something about this switch, and I think you mentioned something about an upright switch. What is the difference between this switch and an upright switch?

Mr. SMITH: I do not remember asking the witness any question about an upright switch.

Q. I don't mean an upright switch, but an upright switch lever.

A. Some switches have high stands, you know, and a light to them, and some of them are just right down at the ground with the rail, low. This was a low switch, right down on the ground with the rail.

Q. Was the lever to the switch laying right on the ground?

A. Yes.

Q. Now, I show you a stick, and will ask you by way of comparison to indicate the length of that switch lever with reference to the length of this stick?

A. Well, it wasn't any longer than that if it was as long. I don't know whether it was hardly quite as long or not. I expect it was something near that length.

Q. The length that you have indicate- as I understood you to put it is about two feet?

A. Yes, sir; just about two feet.

Q. And that was an iron lever about two inches broad?

A. Yes, sir.

Q. And about an inch thick?

143 A. Yes, sir.

Q. And black?

A. Yes, sir.

Q. And laying on the ground?

A. Yes, sir.

Q. Can you now remember which way that switch lever was pointed when laying down on the ground?

A. No, sir; I don't remember which way it was pointed.

Q. Why were you looking at the points of the rails to determine the position in which the switch was instead of looking at this lever laying on the ground?

A. Well, I could tell easier and quicker which way the switch was setting than to look at the lever.

Q. Was there any target or lamp or anything about this switch?

A. No, sir.

Q. So that you had to see by the torch you had in your hand?

A. Yes, sir.

Q. Well, now, what kind of torch was that you were using, a good one or a bad one? I want you to describe it.

A. It was a pretty good torch. It was one I had bought. It was a little better than the one they furnished. It was one I had bought.

Q. It was one that you had bought because it gave a better light than the ones they furnished?

A. Yes, sir; it was a torch that gave a little better light than the ones they furnished.

144 Q. I suppose that was the reason why you were asked the question if you made the torch. You bought it and did not make it?

A. No, sir; I bought it and didn't make it.

Q. I understood Mr. Smith was asking if you made it. Where was the torch after you were hurt?

A. I don't know where the torch was after I was hurt.

Q. You were asked if you stepped down in where the bridle to this switch worked. What was your answer to that?

A. I don't remember whether I did or not. I don't remember whether I stepped down in there or not. I was——

Q. They object to your telling what others told you, and we would object to that, too. Why did you cross the track to the opposite side to give the signal?

A. He could see me better over on that side, and I crossed over there so he could see me good.

Q. Which side of the engine was the engineer on?

A. He was on the right side. I suppose he was over there.

Q. The engine was running forward, was it?

A. Yes, sir.

Q. Then his position would have been on the right side of the engine going east?

A. Yes, sir.

Q. Which side of the track were those switch levers on?

A. They were on the left side.

145 Q. So then when you set the lever, or examined the track, you stepped over on the engineer's side to give him the signal. Is that what you did?

A. Yes, sir.

Q. Please state whether that was your regular habit or practice?

A. It was my regular habit to step over there to give him the signal, so he could see me good, and so it wouldn't delay us any, and so as to get along as fast as we could.

Q. Under your regular habit and the rules of the company to which you referred this morning, were you waiting and expecting that he wouldn't move on you until you gave him signal?

Defendant company, by counsel, objects to the question because leading?

Objection sustained.

Q. When you were examining the switch needles to see whether the switch was in the right shape or not why were you not looking back every minute?

A. I thought I was a sufficient distance ahead, and didn't think he was close enough to catch me, and that I had plenty of time to examine it.

Q. Well, after examining it on that occasion where would you have given him signal?

A. I would have stepped over to his side and waved him ahead.

Q. Did you or not expect him to pass you before you gave him signal?

146 A. No, sir.

Q. Then you didn't expect him to move on you until you had signaled?

A. No, sir.

Q. Now, is that according to the rules governing engineers and firemen?

A. Yes, sir.

Mr. SMITH: What rule are you referring to? Are you referring to the same rule you have heretofore introduced?

Mr. MOORE: The same rule and the same practice witness has been talking about ever since he went on the stand.

Q. You said awhile ago that the last thing you remembered was trying to see the needle point, throwing the light down on the needle points?

A. Yes, sir.

Q. What did you mean by throwing the light down? You didn't mean that you threw the torch down on the ground?

A. No, sir; just held it down, just held it down kinder like that, right quick, to see whether it was right or not.

Q. I understood you to tell Mr. Smith that the recital in your application for employment you made was not correct as to your age. What was the reason you say that you stated in your application for employment that you were a year or two older than you really were?

147 A. I was out there, away from home, and wanted to get work, and just signed it that way in order to get a job.

Q. How old were you at that time?

A. I was 19 or 20, and I don't remember how old I was now.

Q. Why did you think you wouldn't get a job if you put your correct age in?

A. They won't hire anybody in road service until they are 21.

Q. You wanted a position in the road service then?

A. Yes, sir.

Q. You just put down your age as a little older than you were in order to get a position?

A. Yes, sir.

Q. And you filled it for three years and eight months?

A. Yes, sir.

Q. And then got these recommendations the company gave you, these ratings?

A. Yes, sir.

Q. Do you remember what time your suit was actually brought?

A. No, sir; I don't.

Q. I will ask the clerk to let me have the writ. The writ is dated December 30, 1909. What was the number of the train you were going to push the night you were injured?

A. No. 82.

The plaintiff offers rule 561 in book of rules of Norfolk & Western Railway Company, which is as follows:

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Firemen.

561. Firemen report to the road foremen of engines. They must obey the orders of the train master in matters relating to the movement and protection of trains. When at the engine house they are under the direction of the engine house foreman. When with the engine they must obey the orders of the engineman respecting the performance of their duties, and will fire the engine with due regard to economy in fuel. They must be familiar with the train rules and must understand the use of all signals and be prepared to use them promptly when required.

(And witness stands aside.)

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JOHN W. EARNEST—For Plaintiff.

Examined in chief

By Mr. MOORE:

Q. What are your initials?

A. J. W.

Q. Where do you live?

A. Smyth County, Virginia.

Q. How old are you?

A. 28.

Q. What relation are you to Mr. Earnest, the plaintiff in this case?

A. Brother.

Q. Have you ever worked for the Norfolk & Western Railway Company?

A. Yes, sir.

Q. How long?

A. Four years.

Q. In what service?

A. Fireman.

Q. On what division?

A. Pocahontas division.

Q. Is North Fork in that division?

A. Yes, sir.

Q. Mr. Earnest, when did you quit working for the company?

150 A. The 5th day of last July I resigned.

Q. Are you familiar with the duties of engineers with reference to observing signals of their fireman when the fireman was acting as switchman?

A. Familiar with the signals, do you say?

Q. Are you familiar with the duties of an engineer with reference to observing signals?

A. Yes, sir.

Q. Well, you know where your brother was hurt, don't you?

A. Right about the place, yes.

Q. Do you know where those switches are, No. 3 and No. 2?

A. Yes, sir.

Q. Well now, if you are familiar with the duties of an engineer and the duties of a fireman, what were the duties of the engineer with reference to passing switches on signal of your brother, who had to signal?

A. Well, the duty of the engineer is to watch out for the fireman when he is going over these switches, and wait until the switches are thrown to line, and wait until he gets signal from the fireman before he passes over these switches. He has no right to pass over these switches until he gets a signal from the fireman.

Q. Will you explain that to the jury; why he has no right to pass over them until he gets signal from the fireman or signalman?

A. Well, for the reason that if he passes over the switch  
151 he will split the switch, and is liable to break the switch through the needle points, and that is the reason why he has no right to pass over the switch until he gets signal from the fireman.

Q. What about wrecking his engine if the switch was not properly set, if he runs over it before he knows about it?

A. Well, he is liable to wreck the engine, liable to break the needle points and wreck the engine.

Q. What is the fireman sent ahead as switchman to do?

A. Well, he is sent ahead to line up the switches, and when he gets them lined up he is supposed to give the engineer signal to come ahead, when he gets the switches fixed for that. When the switch is ready for him to come ahead he is supposed to give the engineer signal to come ahead.

Q. Has the engineer a right to run over a switch before he gets signal?

A. No, sir.

Q. What might happen there at that place in that yard if the engineers did not observe signals of the switchmen but kept on driving their engines towards the main line? What might be the result?

The defendant company, by its counsel, objects to the question because calling for a pure speculation on the part of the witness.

Plaintiff's counsel withdraws question.

Q. What kind of switches were those switches No. 3 and No. 2?

152 A. What kind of switches, do you say, were they? Well this switch you might say did not have any target on them at all, that is lights is what is called a target. They had a lever something like, well I don't remember exactly but about that long (indicating) or something like that.

Q. About two feet you seem to have indicated?

A. Yes, sir; something about two feet. In one way you throw it you throw it from the track. If I am sure when you throw it from the track that throws it from this way and for the switch, to come off of No. 3, and then when throwed towards the track that lines it up for the back lead, going on down the back lead. For an engine coming off of No. 3 track you must throw the switch from the track, and that sets the switch right for No. 3.

Q. What position is the lever in before and after it is thrown, with reference to the ground?

A. It lays flat on the ground when throwed either way.

Q. What is that lever made of?

A. Some kind of iron. It is just a straight piece of iron something like two feet long.

Q. What color is it?

A. Black, and most of the time rusty and dirty. It lays on the ground and rust gets on it. It is black and rusty and dirty when on the ground.

Q. How large is it?

A. Something like an inch and a half to two inches. It is maybe a little wider one way than the other.

153 Q. What is the color of the ground around there?

A. Black.

Q. What makes it black?

A. Coal dust and coal, such as that.

Q. When it is thrown one way it is against the engineer, you say, and when thrown the other it is to let him out?

A. Yes, sir. When thrown one way it is against him as well as I can remember, and when it is thrown towards the track it is against the engineer to come off of No. 3. When thrown from the track it is set for him to come off of No. 3.

Q. Are both switch levers at No. 3 and No. 2 the same kind?

A. As well as I remember the same kind of switch lever.

Q. They are both levers that lie flat on the ground?

A. Yes, sir; both levers that lie flat on the ground.

Q. Well, when the fireman approaches one of these switches to see the shape the switch is in how does he determine what shape the switch is in?

A. Well, after night he has got to take a lamp and go at the switch, at the needle points, before he can tell whether throwed for him or against him, where he is going to know. If it is not he is supposed of course to catch hold of the lever and throw it, if not set for him, to where he wants to go.

Q. He examines it first?

A. Examines the needle points, yes sir.

154 Q. If it is right what is he supposed to do?

A. He is supposed to give the engineer signal to go ahead. That is, if he is going ahead, and if it is right for him.

Q. If not right what must he do?

A. Wave him down, waving back and forth across the track.

Q. What does the switchman do?

A. That is the switchman.

Q. The switchman then sets the switch, does he?

A. Yes, sir; if it is not set right when he waves him down he is supposed to set the switch right for him and then wave him ahead.

Q. Set the switch and wave him ahead?

A. Yes, sir; set the switch and wave him ahead.

Q. As I understand you then he has no right to go ahead until he gets signal to proceed?

A. No, sir; he has no right to go ahead until he gets signal to go ahead.

Q. What is the color of those needle points?

A. The most of them are worn until they are bright. Some of them right new are not bright, aren't worn much yet, but the most of them are worn pretty bright.

Q. Which is the easier to see, the needle points or this switch lever laying over there on the ground?

A. Why, after night it is a heap easier to see the needle points, because the light shines on the rail, you know, and you can  
155 see the needle points easier than you can see the lever laying flat on the ground, after night. In day time it is different.

Q. Have you any difficulty when you look at the needle points in telling the position of the switch?

A. No, sir.

Q. Mr. Earnest, where were you the night your brother received the injury about which he has already testified in this case?

A. Do you mean about the time he received the injury?

Q. Yes.

A. Well, I suppose I was passing the station, or right close to the station. The train was passing at that time, and I was pushing it. I was pushing the train that was passing at that time.

Q. What train were you pushing?

A. Train No. 82, time freight.

Q. How far did you go with it?

A. I went to Ruth, on the Elkhorn mountain.

Q. You didn't get information then that your brother had just been run over?

A. No, sir, not until I had done went to Ruth and come back through the tunnel to the operator's office on west side of tunnel, at west end of the tunnel.

Q. Did the train crew you were traveling with know that your brother had been injured?

A. Yes, sir.

Q. And yet they didn't tell you about it?

A. No, sir; didn't tell me a thing about it until I had  
156 done gone through the tunnel to Ruth, and come back through the tunnel going back. And of course the train crew didn't tell me then, but my engineer told me then.

Q. He had learned of it when he was passing down through?

A. Yes, sir; he learned it when he got to Morgan.

The defendant company, by its counsel, objects to any evidence as to when this witness, a brother of the plaintiff, was notified of the injury sustained by plaintiff, because incompetent, immaterial and irrelevant, and now moves the court to instruct the jury to disregard same.

The COURT: The objection is sustained, and, gentlemen of the jury, the court now instructs you that the time when this witness, a brother of the injured man suing here, learned of the accident to his brother has nothing to do with the issue on trial here by you and accordingly you will dismiss it from your minds.



Q. At what time did you get there?

A. I don't know hardly what time I did get back down there. Let me see; anyhow it was one o'clock I guess.

Q. Where did you find your brother?

A. I found him in a cab on the eastbound main line. He was in a local cab that they had there at North Fork.

Q. What was his condition?

A. He seemed to be suffering right much when I got in there to him.

Q. He had a leg cut off, didn't he? It had been run over.

A. Yes, sir; he had his leg cut off, mashed up.

157 Q. Had they been doing anything for him?

A. I think they bandaged his leg up at North Fork.

Q. Do you know whether he was rational or not. That is, was he in his right mind, knew what he was talking about?

A. Well, I don't know that he was; don't think he was all the time; no, sir; don't.

Q. What made you think he didn't know what he was talking about all the time?

A. Well, he seemed to be suffering so, was one reason I didn't think he was in his right mine. I think that is about all.

Q. How long did he stay there after you got back?

A. Not but a very few minutes; just long enough for me to change my overalls. I don't remember exactly how long it was.

Q. Where did he go from there?

A. Went from there to Bluefield to the hospital.

Q. What was done to him after he got to the hospital?

A. Well, they didn't do anything for him—Well, I guess it was an hour anyway, or maybe longer than that before they did. I don't remember exactly how long it was. Any way an hour I should think.

Q. Did they amputate his leg?

A. Yes, sir; they amputated his leg. They went to work on him.

Q. Do you remember how long it was that he was unconscious from the amputation?

158 A. No, I don't believe I do now. He was unconscious until way up in the day some time; the next day, or that same day, on Sunday, that he was injured in the morning.

Q. Do you remember what engine took your brother over to the hospital?

A. I don't believe I do.

Q. Do you remember about a train passing there about the time that he was laying there at the station after his injury?

A. Yes, sir.

Q. Where was that train going?

A. Which? After he was injured, do you mean, and laying at the station?

Q. Yes.

A. There was one train that passed there I think going to Vivian yard.

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Q. Where did they get the engine to take your brother over to Bluefield?

A. Got the engine from the yard crew. They had a regular yard crew there at night and taken the engine from that yard crew.

Q. And you don't know what time you left to go to Bluefield?

A. No. I don't know exactly what time we left going to Bluefield.

Q. What was the nature of this wound that your brother had when you got back there that night? Tell what his condition was that you found him in, his leg.

159 A. Well, he was run over and mashed up pretty bad as well as I can remember. Of course it was bandaged up until I couldn't tell anything about the wound much. I never saw the place until after it was wrapped up, until after they got to Bluefield. I seen it after he got to Bluefield; but never saw it there until after it was bandaged up.

Q. Did he bleed much?

A. Yes, sir; he bled lots, a great deal.

Q. Did he seem to complain much?

A. Yes, sir; he was complaining a right smart when I got to him, but after we got near Bluefield it seemed he didn't complain so awful much, not as bad as he did when I first got to him.

Q. What was his condition with reference to fright or shock?

A. Well, he seemed to be shocked very much, and frightened up right smart over the hurt.

Q. How much was he frightened or shocked?

The defendant company, by its counsel, objects to the question because calling for an opinion.

Counsel for plaintiff withdraw question.

Q. Do you know how old your brother is?

A. He is 24.

Q. How old was he when he was hurt?

A. He was 23.

Q. I believe there is a sister between you and your brother, isn't there?

A. Yes, sir.

Q. What is your brother's condition now, Mr. Earnest, with reference to working on a farm or anywhere else.

160 A. Well, he can't do anything at all hardly on a farm or—

The defendant company, by its counsel, objects to the question because calling for an expert opinion of witness if he be any more of an expert than the jurors themselves, which counsel thinks is improper.

The COURT: Witness cannot give his opinion but may tell what have been the results of his observations.

Q. Do you live with your brother?

A. Yes, sir.

Q. And where do you live?

A. In Smyth County, Virginia.

Q. State whether you live on a farm?

A. Yes, sir.

Q. Well now, just tell us what your brother's condition is with reference to his doing work on a farm, or anything of that kind.

A. Well, his condition for doing work on a farm is that he can't get about and can't do it. He can't plow; nor can't walk through plowed ground, nor anything of that kind. You might say that he can't hardly do anything at all on a farm.

Q. Well, can he do enough on a farm to earn wages?

A. No, sir; I don't suppose he could get any wages at all. I don't suppose if he wanted to hire out on a farm that they would hire him at all.

The defendant company, by its counsel, objects to the answer because giving a supposition or opinion of witness.

161 The COURT: Witness must not give his opinion but may tell what he has observed about his brother, as to his present capacity to earn wages on a farm. But in doing that it may sound as if giving an opinion but I would consider it to mean what witness has seen.

Q. Have you observed your brother on a farm to see what he could apparently do?

A. Well, yes, I have been with him some, not a great deal, around on the farm. I have been with him some.

Q. You live there on the farm together?

A. Yes, sir.

Q. Do you know whether he can walk around with this limb?

A. He can walk about but not very well. He can walk about sorter as a make-shift, but of course he can't get about very good with it.

Q. What was the condition of your brother's health before he was injured in this accident?

A. Good. He had good health.

Q. Do you know anything about his being sick before he was injured?

A. No, sir; if he was sick I didn't know anything about it, and I was right there with him at North Fork pretty near all the time. I roomed with him.

Q. Did you ever know of a doctor attending him?

A. No, sir.

162 Q. Mr. Earnest, where did this train No. 82 that you pushed over the grade that night go to?

A. Well, it was going from Bluefield, and I suppose coming on east. Of course they changed the crews there at Bluefield, and then come on east.

Q. Well, we will have to go back a little. In leaving North Fork where would it get into Virginia if it went into Virginia?

A. In Flat Top yard I think is in Virginia.

Q. How long would it be in Virginia?

A. How long would it be in Virginia?

Q. Yes, how many miles would it travel in Virginia?

A. After it left there, do you mean?

Q. Yes, after it left Flat Top yard.

A. Well, I couldn't hardly tell you how many miles it would be in Virginia, but a good little ways.

Q. How far is it from Flat Top yard to Bluefield?

A. Seven miles I think it is.

Q. When it gets to Bluefield it is in West Virginia then?

A. Yes, sir; it is in West Virginia then, yes sir, that is right.

Q. In what State is North Fork?

A. West Virginia.

Q. So then a train, this train, leaving North Fork would get into Virginia at Flat Top yard?

A. Yes, sir.

Q. So that a train would travel that way. Was that train broken up or separated in any way from the time it left North Fork until it got to Flat Top yards?

A. No, sir.

Q. From Flat Top yards on into Bluefield what would be condition of the train? Would it be broken up, or any cars taken from it?

A. No, sir. Sometimes they took a meat car or something out, but very seldom. Some chance times they took a meat car or something like that out and set it off. It is very seldom it is ever broken up.

Q. And this train that you pushed went out of West Virginia into Virginia, and if it got to Bluefield it got back into West Virginia again?

A. Yes, sir.

Q. Isn't it, as a matter of fact, about 25 miles from North Fork over to Bluefield?

A. It is 21.5 miles.

Q. Witness is with you.

Cross-examination.

By Judge JACKSON:

Q. I believe you say you worked for the Norfolk & Western Railway Company four years?

A. Yes, sir.

Q. Were you engaged as fireman during that time?

A. Yes, sir; sometimes I was at home maybe a month or so on vacation, but was engaged with the company in the service of the company at the same time.

164 Q. You quit on the 5th of July 1909?

A. Yes, sir.

Q. Are you older or younger than your brother?

A. I am older.

Q. What have you been doing since the time when you were in the service there of the company?

A. I haven't been in the service of the Norfolk & Western since.

I worked on a farm last summer, and have been working at a saw mill this last winter and this spring.

Q. And you say that you are familiar with the practice in reference to signals on the Norfolk & Western Railway?

A. Yes, sir.

Q. Where you ever engaged in pusher service in this yard at North Fork?

A. Yes, sir.

Q. When were you engaged in that service at North Fork?

A. Well, I was engaged in pusher service at the same time my brother got hurt.

Q. Who was your engineer, or who were your engineers during that time? Give their names.

A. I was firing for Gene Wright at that time. I believe he spells his name Eugene.

Q. You were on the North Fork pusher?

A. Yes, sir.

Q. You were not on the Vivian pusher?

165 A. On the North Fork pusher.

Q. Eugene Wright was the man you were engaged with, who was the engineer, and you were fireman under Eugene Wright in North Fork yard?

A. Yes, sir.

Q. Who were you with before that?

A. Before that I had a river run.

Q. Who was the engineer under whom you were engaged Mr. Wright?

A. At that time yes sir.

Q. How long were you engaged in pusher service in North Fork yard?

A. I don't remember now exactly what time I did work there.

Q. The practice that you say was followed, the habit of the business while at North Ford yard, I wish you would state it again.

A. The fireman's duty?

Q. Yes.

A. The fireman's duty was to go ahead in throwing switches and see that they were lined up, and if they wasn't lined up he was to line them up for the engineer and then give signal to the engineer to come ahead, if he was going ahead.

Q. Suppose they were all right, already lined up, what did he do then?

A. He was supposed to wave him ahead if already lined up.

166 Q. To wave him ahead?

A. Yes, sir; if already lined up for him.

Q. Where did he stand when he did that?

A. Well, in the North Fork yard there he would have to get over on the engineer's side, on the right side of the track coming east.

Q. Was that the practice, for him to go over on the right side and signal the engineer to come on?

A. Yes, sir; it was the practice on the yard if the engineer couldn't see him from the other side—

Q. What was the practice?

Mr. MOORE: Let the witness finish his answer.

Judge JACKSON: All right, but I wanted to understand what he meant.

A. It was the practice on the North Fork yard for the fireman to cross over to the engineer's side provided he couldn't see him from where the switch is at.

Q. Suppose he could see him?

A. Well, just to wave him ahead and go on to the next switch.

Q. Wave him ahead?

A. Yes, sir; if the engineer could see him to wave him ahead.

Q. Well, I understand that you firemen went ahead to see whether this switch was all right?

A. To see whether the switch was all right, yes sir.

167 Q. It depended on how the lever was turned as to whether it was all right or not?

A. Yes, sir; it depended on how the lever was set.

Q. Where was the lever, on the outside of the track?

A. On the outside of the track, yes sir.

Q. And it was a very easy matter for him to tell from the lever whether the switch was right or not, wasn't it?

A. Well, it was much easier for him to tell by the switch after night.

Q. Why do you say it was easier to tell by the switch after night?

A. Well, of course sometimes that lever is throwed right. That is, now like you are going to throw the lever for No. 3 switch, and it is throwed over from the rail, a heap of times the needle points don't fit up exactly close, and you can take your lamp or torch, whatever you have, and look at the needle points and see whether they fit tight or not.

Q. You say sometimes they didn't fit up. If the lever is right isn't it bound to fit up?

A. If the lever is right it is bound to fit up, but a heap of times—

Q. Do you mean to tell the court and jury that if a man went there and examined the switch points to see whether it was set right, and then if he found it was not he went over and took his lever and set it right, and then crossed back over and signalled the engineer to come on? Do you mean to tell this jury that that was the practice in that yard?

168 A. It was the practice in that yard to go and examine that switch to see if was right, and if not set right for the engineer to come out then he waved him down if he was too close down on him, waved him down so he wouldn't run through the switch, and then throws the switch and gets over where he can see him and waves him ahead, after he gets the switch set right.

Q. Is there any trouble in the world about a fireman telling whether that switch is right from the lever itself?

A. Yes, sir; sometimes there is trouble telling.

Q. Don't you know he could take a match there and strike it

and tell whether it was right, standing from here to where that gentleman is sitting over there on the jury?

A. No, sir; he couldn't if it was a very dark night.

Q. If it was a dark night. You say the reason why it is easier to tell from the needle points is that the light shines practically right on the track and it glistens, and that you can tell it in that way. What light?

A. The light of the torch. It gives a bigger light than a match, and if you are close to it you can tell.

Q. How close do you have to be to it?

A. On dark nights sometimes you have to be right up at it, so as to be close enough to see, on a right dark night.

Q. Do you mean to tell this jury that in order to tell whether the needle point is right you have to get up over it with a torch  
169 and look down on it to see whether it is right or not?

A. You have got to get up where you can see it.

Q. Yes, but if you have the necessary light can't you be eight or ten feet off from it?

A. No, sir; he can't.

Q. Or even fifty or twenty-five feet?

A. No, sir.

Q. You have to be right up on it to examine it in that way?

A. Yes, sir.

Q. Is there any other light around there?

A. Not right there at them switches there wasn't any. There ain't any torches on the switches, or targets I mean.

Q. Is there any other light there?

A. No, sir.

Q. No light there at all anywhere close?

A. There is some down at the coal wharf, but that is way down below where the switches are.

Q. Isn't there a light right close to this switch?

A. No, sir.

Q. Doesn't North Fork have any lights? Is it a dark town?

A. North Fork has lights, but not right at that switch.

Q. None in that section at the switch?

A. No, sir; not right close to the switch.

Q. Isn't there a light within 25 or 30 feet of it?

170 A. No, sir.

Q. Aren't there two or three lights there within one hundred feet of that switch?

A. No, sir; I don't think there is.

Q. You are positive about that?

A. I don't think there is any light there.

Q. Were you ever on that yard except when engaged in pusher service there?

A. Yes, sir.

Q. You are acquainted with it and you tell the jury there is no light there at all?

A. Yes, sir; I am acquainted with the yard.

Q. Could you give an idea how often you helped in pusher service there on the North Fork yard while you were there?



A. How often, do you mean?

Q. Yes, how often.

A. Well, as a general thing I always took about eight hours' rest, anyhow eight hours' rest after I made a day, and sometimes would go back to work after my eight hours' rest was up, and sometimes it would be longer before I would get out again after making my day. I would push several trips over the hill while out.

Q. Now take the first switch: You say after the fireman signals the engineer to come on he comes through that switch and then stops, does he? He isn't expected to stop when he comes  
171 through the switch, is he, and wait for another signal?

A. Yes, sir; he is expected to stop before he goes through the other switch.

Q. He is expected to stop entirely before he goes through another switch?

A. If he don't get a signal from the fireman, or see him so he can wave him ahead, he is expected to stop before he goes through the other switch. He has no right at all to go through the other switch before he gets a signal from the fireman that he is ready.

Q. You say the reason for that is that he might derail a car or split the switch?

A. In going through the switch he is liable to split the switch and break the switch stand.

Q. You say that is the purpose of the rule, to prevent that?

A. Yes, sir.

Q. Is there any other purpose that you know of for this signal except to prevent a car being derailed?

A. Well, he is liable to break the switch, and the engine get on the ground.

Q. You say that is really the sole purpose for which that is required?

A. Yes, sir.

Q. But that he doesn't come through the switch and stop but moves on and then stops before he goes through the other switch?

172 A. He is supposed to stop before he goes through the other switch.

Q. Do you mean to say that that is the practice on this yard when you were there under Eugene Wright?

A. Yes, sir; that is the practice, Eugene Wright never went through a switch without my giving him signal to go through to show him the switch was right.

Q. Did you say in your examination-in-chief that the rules required this signal to be given or not?

A. Yes, sir; the rules requires you. That is the practice, the fireman's duty.

Q. You are speaking about the practice now. I understand what you say about that. But do the rules of the company require it? Do you know of anything outside of the practice and usage in the yard that requires anything of that sort?

A. No, I didn't speak anything about the rule. I said that was the practice.

Q. Well, if you are confining yourself to the practice and usage there all right.

A. No, I didn't say anything about the rule at all.

Q. If you said the rules you didn't mean by the company's rule book?

A. No, sir; I didn't say the rule book.

Q. You mean by rule that it was the practice or custom?

A. Yes, sir.

Q. That is all.

173 Re-examination:

By Mr. MOORE:

Q. I will ask you about the rule book, however? Is there a rule that requires an engineer to look out for signals?

A. Well, it says in that book somewhere.

Q. Is there a rule of that kind in the book?

A. There is a rule of that kind in the book somewhere. I don't remember exactly where it is. The rules are there but I don't remember exactly what number it is.

Q. I will ask you to look at rule 554 and see whether that is the rule you refer to?

A. Yes, sir; that is the rule.

Q. You have been asked a number of questions, and emphasis laid upon the particular practice in the North Fork yard. I want to ask you what is the practice in other yards about signalling?

The defendant company, by its counsel, objects to the question because irrelevant as to what may or may not be the custom of signalling in other yards.

The COURT: I will sustain the objection for the present, and unless afterwards shown to be relevant, in which event plaintiff may recall the witness.

Q. You were asked a number of questions about the result to the engine if the switch was not right and the engineer ran over it before it was fixed or put in shape. What might be the

174 result to the switchman if the engineer ran over it before he got signal.

The defendant company, by its counsel, objects to the question because leading and also because not properly re-examination.

The court sustains the objection on the ground of not being properly re-examination.

Q. That is all.

Recross-examination:

By Judge JACKSON:

Q. You refer to this rule 554 as for what purpose? What did you say about that rule?

A. To keep a lookout for signals of fireman and so on, and to keep a lookout for him.

Q. Where do you find anything of that sort?

A. Right there.

Q. Read it and show us.

A. (Reading:)

"They must exercise caution and good judgment in starting and stopping the train, and in moving and coupling cars, so as to avoid disturbance to passengers and injury to persons or property; keep a constant lookout for signals and obstructions; stop and inquire respecting any signal not understood; use every precaution against fire and not permit burning waste, hot cinders, or any other thing to be thrown from the engine, and report on the prescribed form the condition of the engine at the end of each trip."

Q. Who interpreted that rule for you?

A. Not anybody. I always knowed it was in there.

175 Q. Doesn't this rule apply expressly to passenger trains, so as not to cause disturbance to passengers and injury to persons or property?

A. No, sir.

Q. Isn't it dealing with passenger trains? You don't have passengers on engines that are being moved out of the yard, do you?

A. No, sir. But of course it don't apply to passenger trains altogether.

Q. Where does it apply to anything else, what part of it?

A. (Reading:)

"Keep a constant lookout for signals."

He has to keep a constant lookout for signals from any train crew, and if there is nobody on but himself and his fireman the fireman is counted a switchman.

Q. That is, of course, such signals as the rules or practice or custom of the company may required to be given, he must look out for them?

A. Yes, sir.

Q. But if they are not required to be given there is nothing for him to look out for?

A. He must keep a constant lookout to see if any are given, and he will see them.

Q. He hasn't got to look out for them unless it is customary to give them?

A. Of course if he knows they are not going to be given he  
176 don't have to look out for them.

Q. That is so even if it applies to passenger trains?

A. It applies to all trains.

Q. It is talking about trains here that have passengers on them and all that sort of thing?

A. It says here in coupling cars so as to avoid disturbance.

Q. An engine isn't a train, is it?

A. Two or more engines—I have forgot how that rule reads.

Q. One engine is not a train?

A. Yes, sir; it is a train if it is displaying the proper signals.

Q. What kind of signal is that?

A. Well, if running extra it has to carry a white flag, and if

running on some kind of schedule it has to carry some kind of green flag.

Q. It isn't a train if it doesn't carry passengers?

A. If an engine it doesn't carry passengers.

Q. If it is an engine which has just to go out of the yard?

A. If it has a fireman and an engineman on it it has passengers.

Q. They are employés?

A. Yes, sir; they are employés.

Q. That is all.

Re-re-examination.

By Mr. MOORE:

177 Q. Judge Jackson has asked you a good many questions as to whether an engine is a train. Is there a rule somewhere in that book of rules defining an engine as a train if displaying signals?

A. Yes, sir; it is in there somewhere. I think it says two or more engines, but don't know.

Q. Isn't this the rule, page 8,

*"Definitions.*

Train—An engine, or more than one engine coupled, with or without cars, displaying markers."

A. That is the rule exactly.

Q. So when you were telling Judge Jackson that an engine was a train under the rules, that is what you were referring to?

A. Yes, sir; that is the same rule. I didn't know where it was.

Q. He asked you about your construction of these rules. You have always understood, and the railroad men understand, that the same rule applies to the movement of an engine?

A. Yes, sir.

Q. That is all.

(And witness leaves the stand.)

178 D. E. SPANGLER for Plaintiff.

Examined in chief by Mr. MOORE:

Q. Mr. Spangler, what are your initials?

A. D. E.

Q. What official connection have you with the Norfolk & Western Railway Company.

A. Superintendent of Transportation.

Q. Well, then, you are familiar with the road of your company and where it runs and all about it, are you?

A. In a general way, yes sir.

Q. Through what States does your railroad system run?

A. Virginia, West Virginia and Ohio, and touches North Carolina, Tennessee and Maryland.

Q. Your through line I believe is the part of it through Roanoke in Virginia and on through Bluefield, West Virginia, and to Columbus, Ohio, is it not?

A. Yes, sir.

Q. And then it leads to Norfolk, Virginia, from Roanoke?

A. Yes, sir; the main line as now operated is from Norfolk, Virginia, to Columbus and Cincinnati, Ohio.

Q. Do you know the general course of trains, how they travel, with reference to the States, that pass North Fork coming east?

179 A. Well, in a general way, yes. I don't know to what particular states the shipments might be destined that are in the trains.

Q. Suppose a train passes North Fork going east. How far does it travel before it gets out of the state of West Virginia?

A. To Flat Top yard.

Q. North Fork is in West Virginia, is it?

A. Yes, sir.

Q. And Flat Top yard is in Virginia?

A. Partly in Virginia and partly in West Virginia.

Q. How far would a train travel then through Virginia before it gets into West Virginia again after arriving at Flat Top yard?

A. I think it is about four or five miles, something like that.

Q. Four or five miles?

A. Yes, sir.

Q. Then it would travel on eastward to Bluefield, wouldn't it?

A. Yes, sir.

Q. And it would be in West Virginia again?

A. Yes, sir.

Q. Are trains carried or not as solid trains from North Fork coming east to Flat Top yards?

A. Yes.

180 Q. And the trains that would pass North Fork and on through Flat Top yards wouldn't be broken until they would get into Virginia?

A. A through train would not. But there are some trains that come east from North Fork that do not pass the Flat Top yard.

Q. If a through train they would?

A. Yes, sir.

Q. Would or not trains be broken after passing North Fork yard and before they would get into Virginia coming forward as a solid train?

A. Through trains would come as solid trains from Flat Top yard.

Q. Have you a record of the movement of the trains on your road?

A. Yes, sir. Personally I haven't the record of all trains at this time.

Q. But you have the record of the movement of the trains that you were required to produce under the subpoena duces tecum?

A. Yes, what I considered to be the trains.

Q. Did a train pass North Fork on February 13, 1909, known as No. 82, traveling in an easterly direction, and passing North Fork

some time before midnight, I would say between eleven and twelve o'clock?

A. Yes, sir.

Q. Do you have the record of that train?

A. Yes, sir.

Q. What was the consist of that train with reference to 181 where the cars originated and where they were going to.

A. Train #82 is what we call a merchandise train, a time freight train, made up of miscellaneous shipments originating in the west and going to various points in the east through Bluefield.

Q. Will you refer to your record and tell us where the train originated, or the cars in it, if you can do so, so far as your record discloses that fact.

A. Train #82 on the 13th of February 1909.

Mr. SMITH: I hardly think it necessary to take up the time of the court to go into all those details.

Mr. MOORE: All right, if you will admit that this was an interstate train we will not go further.

Mr. SMITH: I do not care to make any admissions, but will say that we do not expect to present any evidence in rebuttal of this question, and do not think we need take up the time of the court going into the details of the train.

The COURT: Mr. Spangler, from an examination of your records please state whether or not that was an interstate train?

WITNESS: Yes, sir; it was a train composed of interstate shipments.

Mr. MOORE: With the statement of counsel for defendant that they do not expect to rebut this testimony I will not go into details of the cars.

Q. Where did those cars originate so far as your record discloses the fact, the cars that composed train #82?

A. At Williamson.

182 Q. What state is that place in?

A. West Virginia.

Q. To what points were the cars in that train destined?

A. The cars themselves went to fifteen or twenty different places, but the train as it passed North Fork went to Bluefield.

Q. It went from Williamson, W. Va., into Virginia and then again into Bluefield, W. Va. as a solid train?

A. I will modify that statement slightly by observing here a couple of cars in the train that were probably set out before the train got to North Fork.

Q. Possibly two cars were set out before the train got to North Fork?

A. Yes, but the main train went to Bluefield.

Q. How many cars were in that train?

A. About fifty.

Q. Where did some of those cars go to after leaving Bluefield?

A. I haven't a record of where they went after they left Bluefield, not with me, but according to the report here they were destined to

various places beyond Bluefield, for example, Petersburg, Roanoke and Norfolk.

Q. That is enough. Well, Petersburg, Roanoke and Norfolk are in the State of Virginia?

A. Yes, sir.

183 Q. Have you a record of the train or trains that D. E. Earnest assisted over the grade east of North Fork from, I will say, the first of February to the 13th of February 1909?

A. Yes, sir.

Q. How many trains did he assist over that grade, I will say from the first of February to the 13th of February 1909?

The defendant company, by its counsel, objects to the question as irrelevant, incompetent and immaterial.

The COURT: What is the object of this inquiry?

Mr. MOORE: We charge in our declaration that this defendant railway company was engaged in interstate commerce and that plaintiff was engaged in that work.

The COURT: Mr. Spangler, are you or not able to state that numerous interstate trains passed North Fork during the period mentioned?

WITNESS: Yes, sir.

Q. And that pushers were engaged in helping them over the hill there?

A. There were pushers assisting.

Q. And that Earnest helped to push interstate trains over the hill?

A. Not as to all of these I answered you about. There were several that Earnest helped to push over.

Q. Then Earnest did help to push several of them over?

A. Yes, sir.

Q. Between February 1st and 13th, 1909?

A. Yes, sir.

184 Q. And they were interstate trains, such as No. 82 was that you have already described.

A. Not exactly of the character of train No. 82. They were mostly coal and coke trains.

Q. Well, were they interstate trains, those coal and coke trains, carrying cars from one state to another?

A. They were carrying cars containing interstate shipments.

Q. That is all.

No cross-examination.

(Witness leaves the stand.)

The court adjourns until Monday morning, June 27, 1910, at twelve o'clock (noon).



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MONDAY, June 27, 1910.

## Morning Session.

Court reconvened at twelve o'clock noon, pursuant to adjournment on Saturday.

The plaintiff not having concluded his evidence in chief continued to introduce same as follows:

D. E. EARNEST, the Plaintiff, recalled.

Further examined by Mr. MOORE:

Q. How far did you and Mr. Drawbond have to push these interstate trains that have been referred to, particularly No. 82?

A. About nine miles.

Q. To what point?

A. Ruth.

Q. I believe Mr. Drawbond was the engineer, was he?

A. Yes, sir.

Q. How long had you and Mr. Drawbond been pushing these trains, the last time you went to work?

A. About nine days. We worked in that service for nine days.

Q. Were those trains the ones Mr. Spangler referred to here on Saturday?

A. Yes, sir.

Q. Please state whether the engine that ran over you on the night of the 13th of February was displaying markers?

A. Yes, sir.

Q. Is this the book of rules that you referred to in your evidence on a previous day of this trial?

A. Yes, sir.

Q. Is it the book of rules of the railroad company?

A. Yes, sir; it is the book of rules of the railroad.

Q. Under which you were operating at the time of the accident?

A. Yes, sir.

Plaintiff, by his counsel, then asks leave to introduce certain rules from the rule book.

*General Rules.*

Page 6, paragraph *b*. Employés must be conversant with and obey the rules and special instructions.

Page 6, paragraph *d*. Persons employed in service on trains are subject to the rules and special instructions.

## Definitions.

Page 8. Train—An engine or more than one engine coupled, with or without cars, displaying markers.

Page 10. Yard—A system of tracks within defined limits provided for the make-up of trains, storing of cars and other purposes, for

187 which movements not authorized by the time-table or train orders may be made subject to the prescribed signals and regulations.

Rule 12. Manner of using hand, flag and lamp signals:

(a) Swung across the track, stop.

(b) Raised and lowered vertically, proceed.

Rule 102-A. When within yard limits trains must run with great care and under the control of the engineman. \* \* \*

Rule 105. Both conductors and enginemen are responsible for the safety of their trains, and under conditions not provided for by the rules must take every precaution for their protection.

Rule 106. In all cases of doubt or uncertainty the same course must be taken and no risks run.

The defendant company, by its counsel, objects to all rules heretofore offered in evidence by the plaintiff, and says with the exception of those specially applicable to signals they are irrelevant.

The court sustains the objection as to Rule 105, but overrules the objection as to all other rules offered.

Defendants excepts.

Defendant company, by its counsel, then moves the court to strike out Rules 554 and 561 heretofore offered in evidence on Saturday and not then specifically objected to, because irrelevant.

Court overrules objection.

Defendant excepts.

Rule 559. When there is no conductor, or he is disabled, the engineman will have charge of the train and must be governed by the rules prescribed for conductors.

188 Defendant objects to Rule 559.

Objection overruled.

Defendant excepts.

The plaintiff, by his counsel, now moves the court to admit Rule 105 which is made specially applicable since the introduction of rule 559.

The court adheres to its ruling because holding the view that rule 105 is inapplicable.

Plaintiff excepts.

#### Rule 829.

\* \* \* When hand signals are necessary they must be given from such point and in such way that there can be no misunderstanding on the part of engineman or trainmen as to the signals or to the train or engine for which they are given \* \* \*

Defendant objects to rule 829.

Objection overruled.

Defendant excepts.

Mr. MOORE, resuming examination:

Q. Mr. Earnest, please state whether or not this injury to you occurred within a railroad yard?

A. Yes, sir.

Q. Within the yard limits then at North Fork?

A. Yes, sir.

Q. Witness is with you.

Cross-examination:

By Mr. SMITH:

Q. Ruth is in West Virginia I believe, isn't it?

A. Yes, sir.

Q. Are you a member of the Brotherhood of Locomotive  
189 Firemen and Enginemen?

A. Yes, sir.

Q. That is all at present. We wish the privilege of recalling the witness for further cross-examination later on if we shall think it necessary.

Re-examination:

By Mr. MOORE:

Q. I now show you a time-table for the Pocahontas division of the Norfolk & Western Railway, and for the purpose of identification ask your attention to that part of it between North Fork and Bluefield.

Mr. SMITH: We do not wish to encumber the record with putting in all or a portion of a time-table. Just read out the stations you refer to and let them be put on record.

Mr. MOORE: All right. They are shown on here as follows:

North Fork,	W. Va.
Powhatan,	"
Elkhorn,	"
Morgan,	"
Ennis,	"
Switchback,	"
Maybeury,	"
Coaldale,	"
Ruth,	"
Cooper,	"
Bluestone,	"
Flat Top,	Va.-W. Va.
Falls Mills,	Virginia,
Graham,	"
Bluefield,	W. V.

(And witness stands aside.)

Court takes recess until 2:00 p. m.

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MONDAY, June 27, 1910.

Afternoon Session.

Court reconvened at two o'clock p. m. pursuant to recess.

The plaintiff not having concluded his evidence continued to introduce same as follows:

D. E. EARNEST, the Plaintiff, recalled for further cross-examination.

By Judge JACKSON:

Q. You say you were engaged in the pusher service from North Work to Ruth?

A. Why, yes sir, I was engaged in the pusher service. That was where we worked mostly, but sometimes they run us down west to deliver empties, and sometimes they run us up North Fork to help deliver empties.

Q. At the time of your accident, of your injury complained of, you were in pusher service from North Fork to Ruth? You were going from North Fork to Ruth?

A. Yes, sir.

Q. What is the distance from North Fork to Ruth?

A. Why, it is about nine miles.

Q. It is about nine miles?

A. Yes, sir.

Q. As I understand you both of these points, North Fork and Ruth, were in West Virginia?

A. Yes, sir.

191 Q. And of course you didn't have to go out of West Virginia to get to Ruth? During the nine days did you go any farther than Ruth, during the last nine days?

A. I don't remember about that, whether I did or not.

Q. Think and see whether you did or not? Did you in point of fact during that time, and you can think of it, go any farther than Ruth?

A. I don't remember whether I did or not. I don't remember anything about it.

Q. Don't you remember that you did not?

A. No, sir; I don't.

Q. Well, that is all.

Re-examination.

By Mr. MOORE:

Q. Then in your regular service as pusher up that grade would you ever have to go any farther than Ruth?

A. Yes, sir; sometimes would assist them to Bluefield but generally just to Ruth.

Q. Then that service did sometimes require pushers to go as far as Bluefield?

A. Yes, sir; sometimes it did.

Q. And then you would be sent through to Bluefield and go back into West Virginia?

A. Yes, sir.

192 Q. Have you got a memo. book showing the service you rendered at the time I have specified, during those nine days that you were engaged there?

A. To show how far I went?

Q. Yes.

A. No, sir.

Q. You didn't keep any book or any memo. of that?

A. Yes, I kept my time, but didn't keep how far I went.

Q. Or from what points?

A. Yes, I kept a memo. of where I reported at and where I was relieved at.

Q. Have you got that with you now?

A. Yes, sir.

Q. Where is it?

A. In my pocket.

Q. Look at it and see if you can't get the information I have asked for.

A. No, sir. I have just got it as reporting at North Fork and relieved at North Fork. That is all I have.

Q. That is all.

(Witness leaves the stand.)

193 Dr. S. A. VINEY (Colored)—For Plaintiff.

Examined in chief.

By Mr. MOORE:

Q. I believe you are a practicing physician, aren't you?

A. Yes, sir.

Q. Did it happen that you were called to see D. E. Earnest at the time he was injured on the 13th day of February 1909.

A. Well, yes sir, I heard him halloaing, or at least I heard some one, and went to the place where he was holloaing, and when I got there he said something about a doctor, and some one standing by him said there was one right here, and of course I did some work for him.

Q. You heard him holloaing?

A. Yes, sir; I heard him holloaing.

Q. How far were you away from the point where you found him when you heard him holloaing?

A. Well, I guess about between ninety and one hundred feet. No, I mean about fifty yards at the time I heard him holloaing, just about fifty yards.

Q. Have you an office there near him?

A. Yes, sir; I was at my office at the time.

Q. So you live and practice at North Fork, do you?

A. Yes, sir.

194 Q. In what condition did you find him?

A. Well, when I got there of course I discovered that his right leg had been fractured, and the bones broken, and the tissue also lacerated, and his left ankle or heel the tissue was torn from it, and he was bleeding quite a little at that time.

Q. What was his physical condition and mental condition.

A. Well, he seemed to be very much frightened, and of course during that fright he seemed to be very weak.

Q. What was his physical condition with reference to pain?

A. Well, he seemed to be having some pain. Of course he was suffering shock at the time, and had not reacted from it, and was having some pain.

Q. How soon after you heard him holloaing before you got there?

A. I couldn't tell but about five minutes perhaps from the time I first heard him holloaing until I got there.

Q. Where was he when you found him in reference to the track, on which side of the track?

A. He was lying between the two tracks. That is, on the right side of the track going east, of the one that he was hurt on.

Q. Well, at what place in that yard was he hurt?

A. Now, as well as I remember it was near the point of the needle of the switch I think called No. 2. I think No. 2  
195 switch. The switches are numbered from east to west, and I think it was No. 2 switch.

Q. It was near the point of the needle of the switch?

A. Yes, sir; as well as I remember.

Q. So then it was at No. 2 where you found him?

A. Yes, sir.

Q. And on the right hand side coming east?

A. Yes, sir; on the right hand side coming east.

Q. How close was he lying to the track when you found him?

A. I just can't say, but believe he was lying right close to the track at the time I got there.

Q. Had his leg been drawn back off the track when you got there?

A. Yes, sir; his leg had been drawn back off the track.

Q. To what extent was this laceration of the flesh of the leg that had been run over; severed from the body entirely?

A. No, sir; not completely so. I think the injury began somewhere near the knee-joint and extended down towards the ankle, and I don't remember whether the ankle of that leg was injured or not, but the bone was fractured, and also the skin and flesh lacerated, and of course a tearing of blood vessels and nerves.

Q. Was that part of his leg which had been run over still hanging to his body?

A. Yes, sir; as well as I remember it was still hanging to his  
196 body.

Q. Was he bleeding or not?

A. Yes, sir; bleeding.

Q. What did you do to relieve him?

A. I tied a cord about his leg in order to obstruct the flow of blood, and as well as I can remember I also tied one on the left leg just above the ankle also to check that blood.

Q. Where did you get the cord?

A. I had them in my pocket. I think one was a shoe string and the other I think a twisted cotton cord.

Q. Of course when you started to relieve the suffering you didn't know what you would need?

A. No, sir.

Q. And you just used a shoestring and a piece of cord you had in your pocket?

A. Yes, sir.

Q. You live there and have an office there?

A. Yes, sir.

Q. Are you familiar with those yards?

A. Yes, sir; my office is close to the yards, and I see them every day.

Q. Do you still keep an office there.

A. Yes, sir; my office is lower down now than it was then, closer to the *the* place of injury than it was at that time.

Q. You say it was at No. 2 and close to the needle points?

197 A. Yes, sir.

Q. Do you mean close to the end of the switch?

A. Yes, sir; where the rail comes close to the other one to ward a train off on to the other track.

Q. Do you remember whether it was east or west of the needle point?

A. I couldn't say.

Q. How close to the needle points did you think it was?

A. Well, I guess within a radius of five feet.

Q. Within five feet of the needle points at No. 2?

A. Yes, sir.

Q. What became of the young man after you had given him this attention?

A. Well, I left him there and went back to my office. I think they sent perhaps for the company doctor, or for some means to get him to the station, and I think they said they were going to take him away on an engine somewhere. But he was there when I left.

Q. You think they had sent for the company doctor possibly?

A. Yes, sir; I think they had.

Q. You were not the company physician?

A. No, sir.

Q. You were just there relieving him temporarily?

A. That is all.

Q. Witness is with you.

198 Cross-examination.

By Mr. SMITH:

Q. You are a colored man, aren't you?

A. Yes, sir.

Q. You said that Mr. Earnest was lying within a radius of five feet of the needle point?

A. Yes, sir.

Q. You don't undertake to locate him any more particularly than that?

A. No, sir; I don't.

Q. And he was on the right hand side of the track that the engine was on?



A. Of the track going east, that I suppose he was injured on.

Q. Could you see the engine standing there?

A. Yes, sir; but I don't remember exactly what track it was on.

The COURT: You will have to talk louder so the jury and court may hear you.

WITNESS: I say the engine was standing there but don't remember just what track he was on.

Q. He was on the right hand side of the track leading from switch No. 2?

A. Yes, sir; on the right hand side.

Q. I think that is all.

(And witness leaves the stand.)

199 EMMET HALL, for Plaintiff.

Examined in chief by Mr. MOORE:

Q. Mr. Hall, where do you live?

A. I can hardly tell you. I reckon I will say Christiansburg.

Q. Montgomery county was your home I believe?

A. Yes, sir.

Q. Where were you raised?

A. Yes, sir; in Montgomery county.

Q. Your people live there now, do they?

A. Yes, sir.

Q. Mr. Hall, what is your business?

A. Well, I have been locomotive engineer for several years, and worked in mines.

Q. Talk so these gentlemen can hear you.

A. I have been working for the railroad company about nine years, and then I have worked in coal mines about nine years.

Q. Did you ever work for the Norfolk & Western Railway Company?

A. Yes, sir.

Q. In what positions?

A. I worked there as fireman and as engineer.

Q. How long did you work as fireman and as engineer?

200 A. Three years and eight months as fireman, and five years and eight months running.

Q. When did you quit work for the Norfolk & Western?

A. I disremember the date, but something like two years ago.

Q. Did you or not have any trouble that you quit? You may be asked about that.

A. Yes, sir; I was discharged.

Q. Well, are you familiar with the rules and regulations of the Norfolk & Western Railway Company as to the movement of trains and the duties of engineers and firemen?

A. Yes, sir; tolerably well.

Q. Did you ever work on the North Fork yard?

A. I don't know as I ever worked on it, but have been in and out of the yard many times.

Q. In what service were you when going in and out of the yards?

A. Firing and running both.

Q. Do you know where the switches are there?

A. Yes, sir; I know pretty well where they are located.

Q. They have been referred to here in evidence as switches 3 and

2. Do you know where they are located?

A. Yes, sir; I know pretty well where they are located.

Q. Will you please state to the jury in your own way what are the duties of firemen on the Norfolk & Western Railway in  
201 the yards at North Fork, or in other yards, when directed to pilot an engine out of the yard.

A. Well, he is supposed to go in front of his engine and see that all of the switches are changed, and give signal to engineer if they are ready to come on out; see that there are no obstructions on the track.

Q. To see that there are no obstructions on the track?

A. Yes, sir.

Q. Well, if he finds obstructions on the track what kind of signal does he give then?

A. He waves him down, across the track.

Q. If though he finds the switch in proper shape, or sets the switch in proper shape, what signal does he give?

A. Waves up and down.

Q. Will you please tell us whether you as an engineer, or whether the duties of an engineer, permit one to run over a switch until he knows whether it is set or not, or until he receives signal to proceed?

A. His duties are not to run over a switch in a yard there where he is fetching an engine out. His duty is to wait until he gets a signal, for he don't know how the switch is maybe, and if he don't know how it is he must wait for signal.

Q. If he doesn't know how the switch is he must have a signal?

A. Yes, sir.

Q. What is that signal?

202 A. To come ahead or to stop. Lots of times you get there and can't change the switch, and the fireman will wave you down. If he can change the switch he gives you signal to come on out.

Q. If the fireman got to the switch and found he could not change it, or examined it and saw he could not change it, or had trouble in changing it, then he would wave the engineer down?

A. Yes, sir.

Q. Well, if he got to it and hadn't time to examine it to see the shape it was in what would he do then?

A. He would wave the engineer down if he could get across there to wave him down, or the engineer is supposed to stop before he passes the switch.

Q. That is what I am getting at. Then is an engineer supposed to pass over a switch at all before getting signal either to stop and let him fix it or get signal it is all right?

A. He is supposed to get signal it is all right.

Q. Before he passes over a switch?

A. Yes, sir.

Q. What is the reason for his having a signal to go ahead before going through a switch?

A. He is liable to run through a switch and damage the company's property, or is liable to run over the fireman there trying to change the switch. Of course the fireman is going to try and change the switch if it is wrong, for that is his business, that is what  
203 he has been sent there for, and it is a violation of the company's rules for a man to run through a switch. He must get signal before running through a switch.

Q. What is the trouble about running through a switch?

A. Lots of times the needle points might break and derail his engine, throw it off the track. And furthermore it might break the needle points, and then the switch wouldn't fit up properly against the rail on either side, or the angle bar that runs across there from one side of the lever to the other is liable to break.

Q. Well now, if I understand you then, the signal to stop might be given anywhere, whether he is at the switch or not, if it is necessary to stop?

A. Yes, sir; anywhere.

Q. You say if he found obstructions on the track he must give signal to stop no matter where that is?

A. Yes, sir.

Q. Then when he gets down to the switch and finds he can't operate the switch, or something wrong with it, then he must give engineer signal to stop until he gets the switch fixed?

A. Yes, sir.

Q. But if he finds the switch in favor of the engineer so as to go on through, or if he has time to set the switch, then he signals him to go ahead?

A. Yes, sir.

Q. And it is his business not to run through a switch until he gets proceed signal, as I understand you?

204 A. Yes, sir.

Q. Do you know what the custom is, or the habit, or the practice, of these railroad employes in the yards in piloting engines about as to the walking between the tracks or between the rails?

A. I hardly know what is the habit. I paid not much attention to the yard work while on the road. They generally all went in the middle of the track; I would generally see them always in the middle of the track.

Q. What do you mean by "in the middle of the track"?

A. Between the rails.

Q. Well, what have you seen? Have you seen them walking in the middle of the track?

A. Yes, sir.

Judge JACKSON: He first said he didn't know, had not paid much attention to yards, and then said they walked in the middle of the track. Let us see if witness is talking about what he has seen in North Fork yard?

Q. All right. Have you seen them between the rails in the North Fork yard?

A. Well, I wouldn't be positive now. It has been a right smart while since I railroaded, and I won't say right about North Fork yard, wouldn't be positive about the yard right there at North Fork.

Q. Now, supposing then that fireman is proceeding ahead of his engine to pilot the engine out of the yard, and in the night  
205 time, and is carrying a torch. When he gets to the switch that is operated by a switch lever laying down flat on the ground on the outside of the track, how does he find out whether the switch is against the engineer or in favor of him so he may go through?

A. When I fired and had that kind of job I generally always shined my light on the rail and looked at the needle points. This is the way I did it.

Q. Then when you had that kind of job I have just described you generally shined your light on the needle points?

A. Yes, sir.

Q. To see the shape they were in?

A. Yes, sir.

Q. Why would you shine the light on the needle points to see the shape they were in?

A. The needle points of the rail were always rubbed bright, and always shining, and your light would shine on the rail, while your lever was always dark or black, and you could see so much quicker by throwing your light on the bright rail than on the switch lever.

Q. What position would you be in to examine these needle points?

A. You might be on the inside of the track, or you might be on the outside of the track. I couldn't say which place, but whichever place you were at.

Q. Then if you were doing that and found the needle points right, or set the switch so it would be right, where would you take position to give this go-ahead signal?

206 A. I would get where the engineer could see me.

Q. Which side would that be on?

A. On the right side. If the switch was on the left side I would throw it and cross over the track so he could see my signal.

Q. If the switch was on the left side why would you cross over to the other side to display the signal?

A. Because the engineer could see it better. The engineer couldn't see it on the left side because he was on the right-side.

Q. That is, if the engine was close to you, or something of that kind?

A. Yes, sir.

Q. Would he or not be more likely to see you if you did cross over on his side?

A. Yes, sir.

Q. About when did you quit work for the Norfolk & Western Railway, as nearly as you can remember?

A. I would say about twenty months ago.

Q. Then you must have quit work for that company a little while before Mr. Earnest was hurt?

A. Yes, sir; I wasn't on the road when Mr. Earnest was hurt.

Q. And you worked for the company about nine years?

A. Yes, sir; over nine years.

Q. As a fireman and an engineer?

A. Yes, sir.

207 Q. Where was your run while you were a fireman and an engineer?

A. I fired all my term out of Bluefield, and I ran out of Bluefield part of the time, and at other times I worked between Vivian yard and Williamson.

Q. Was that on the Pocahontas division?

A. Yes, sir; on the Pocahontas division. I worked some little on the Clinch Valley division, fired and run both on the Clinch.

Q. Witness is with you, gentlemen.

Cross-examination.

By Mr. SMITH:

Q. I understood that you never worked on the North Fork yard at all?

A. You understood that I didn't?

Q. Yes.

A. I went there hundreds of times on engine 62 when I was firing for Bill Kerns, and laid there for the yard engine to take the train up North Fork hollow and to get a train and come out with it. I worked out of North Fork all the time I was on the river.

Q. I misunderstood you, then. You call that working on the yard, taking your engine in?

A. That is the only work. There are no yard engines there. The engines come in and take a shift and take them out. There is no yard engine there.

208 Q. Were you in pusher service from North Fork?

A. I have worked some little in pusher service.

Q. In North Fork yard?

A. Yes, sir; out of North Fork yard. I think I worked four or five days; never had a regular job there on pusher. I was only dead-headed from Bluefield there as an extra man to work a few days in case they run out of engineers.

Q. When was that?

A. That was the first of my running.

Q. Well now, you said something about a rule in reference to not going through a switch until you got signal. Did you refer to any rule in the book?

A. Well, it is the company's rule. You let a man run through a switch with an engine and tear the switch up and see if he don't get a suspension. It is against the company's rule.

Q. What I asked you was, are you speaking of a rule in the rule book or of an unwritten rule?

A. I guess it is an unwritten rule. I don't know as I ever saw it

in the written rules. It says there you get across over on the main line switch, but it is a damage to the company's property to run over these switches. I don't think there is any written rule to that effect. If there is I didn't see it.

Q. Well, you said the object of that was to prevent damage to the company's property, and also to prevent running over the firemen?

A. Or hurting anybody working about the switch. Of course we was talking on the fireman's subject was the reason I 209 spoke it that way.

Q. Was the fireman supposed to keep on the track and let the train run over him?

A. No, sir.

Q. I mean, if the engineer doesn't pay attention to that rule is the fireman supposed to stay on the track and be run over?

A. No, sir; but the fireman is busy at work and trying to get the switch open.

Q. If he is busily at work trying to get the switch open could the engine run over him?

A. Yes, sir; if he was standing on the side next to the track the engine would hit him.

Q. To throw the switch suppose it is on the outside of the track, and far enough away from the track or engine so the engine couldn't strike him, it couldn't run over him then, could it?

A. No, sir; not if that far away.

Q. So it couldn't run over him if he was working trying to open or close the switch?

A. The pilot of the engine would hit him.

Q. It would necessarily hit him?

A. Yes, sir; as short as those throws are.

Q. He could not have held the throw of that switch without the pilot of the engine hitting him?

A. If he reaches right down and catches hold of that there lever the pilot would hit him.

Q. Are you sure of that?

210 A. Yes, sir; on the North Fork yard.

Q. He couldn't have held the lever to throw the switch without the pilot of engine hitting him?

A. He could stand way off to the right and reach down and get to where a man goes up to the switch and throw it and the pilot of the engine not hit him, but if he reached down in the way a man goes up to the switch and throws it it will hit him every time.

Q. I believe you said you were discharged, Mr. Hall?

A. Yes, sir; I was discharged.

Q. What were you discharged for?

A. Violating the company's rule.

Q. What rule?

A. I don't know as that is necessary.

Q. If you object to telling I don't know as I will insist. Do you object?

Mr. MOORE: Go ahead and tell what you were discharged for.

A. No, sir; I don't object.

Q. Then what was it for?

A. I was discharged for giving an order of my time for six dollars.

Mr. MOORE: How much was the amount?

WITNESS: \$6.50.

Q. Was that what you were discharged for?

A. Yes, sir; that is what my discharge said.

Q. Is that what your discharge said?

211 A. Yes, sir.

Q. Stand aside.

Re-examination.

By Mr. MOORE:

Q. Then if he had been on the outside of the rails and throwing the switch by the lever, unless he had been standing back and reaching under the pilot as it came along, the pilot would have struck him anyhow?

A. Yes, sir. I wish to correct something about that discharge. If I ain't mistaken it might have said "for having your wages attached and giving an order on your time." You can get the discharge from the office.

Q. You say the discharge might have said for having your wages attached?

A. For giving an order on your time, too. I won't be positive whether that is in it or not.

Judge JACKSON: You say that pilot would strike a fireman who was working the lever.

WITNESS: Yes, sir.

Q. How do you know that?

A. I know it from them switches there.

Q. Well, when he is working the lever if he goes there to the track and takes it up for the purpose of setting the switch, if that is necessary, he is standing sideways to the track is he not while doing it?

A. No, sir; a man goes this way and just takes up the switch and throws it. (Indicating.)

212 Judge JACKSON: He can have his back to the switch? It is not necessary for him to have his back to the train; the switch is this way and that way?

WITNESS: No, sir; say here goes the track along here.

Q. The lever I mean.

A. The lever throws to the track and from the track on those switches.

Q. His face would be towards the track?

A. No, sir; coming out of there you face the switch, and your switch lever is right here, and you throw it for the track or to the track to open it and from the track to close it.

Q. You say he would have his back to the train when he was doing that?

A. Yes, sir.

Q. Couldn't he have his face to the train just as well?



A. Yes, sir; he could turn around but I was talking about his coming out of there.

Q. That is all.

Mr. MOORE, resuming re-examination:

Q. Mr. Hall, then when the switch lever is thrown towards the track it is right up close to it, is it?

A. Yes, sir.

Q. Do I understand you to say when a man would be doing that he would be in danger of being struck by the pilot?

A. Yes, sir.

213 Q. Unless he would be down and right back under the pilot?

A. Yes, sir.

Q. So that the engine in passing there would likely strike the switchman, or the fireman if he was working at the switch, even if he were on the outside of the rails at that switch?

A. Yes, sir.

Q. Mr. Hall, supposing that engine were coming out of the yard at the rate of three or four miles an hour, with the engineer at his post of duty—Well, first, how should those engines be handled by the engineer in coming out of the yard, or in going into the yard, as to that matter?

A. He should go in slow or come out slow, looking out for signals, caution signals.

Q. What is the engineer's position on that engine?

A. His position is to keep a lookout and take care of his engine, and watch out for signals.

Q. Well, now, if he would come out slow and go in slow with his engine how long would it take him to stop his engine before running over something if he saw there was danger?

A. Well, there is a whole lot of difference in the brakes on engines. If an engine's brakes are in first class shape it don't take but a very few feet to stop coming out at the rate of three or four miles an hour.

Q. How quick could he stop?

214 A. If he had a good *break* on the engine and was coming out at the rate of three or four miles an hour he ought to stop in ten or twelve feet or something like that.

Q. Is an engineer's position such, if he is at his post of duty, that he can see the track ahead of him if he is looking out?

A. Yes, sir; he can see the track ahead of him.

Q. Do you remember whether it is up grade there at North Fork coming out of the yard?

A. Yes, sir; a little up grade.

Q. Well, taking that fact into consideration if he had his engine under proper control in coming out of the yard how soon could he stop?

A. Well, I will say in about ten feet is about as close as a man could make it, from the time he could get the signal until he would stop.

Q. You are referring to stopping the engine, are you?

A. Yes, sir.

Q. Suppose an engine is coming up that grade and running not over three miles an hour, how many feet would it run before he could stop if he had his hand on the throttle and eye on the track?

A. I think that is about as close as a man can stop an engine, ten feet, is about as close as a man could stop.

Q. That is all.

(And witness stands aside.)

215 S. B. RHODES, for Plaintiff.

Examined in chief by Mr. MOORE:

Q. Mr. Rhodes, where do you live?

A. Roanoke.

Q. How long have you lived here?

A. The last time about two years, and altogether about eight years.

Q. In what business are you engaged here?

A. Manager for the National Life Insurance Company of Vermont.

Q. I believe then you are a member of an insurance firm, are you?

A. Junior member, yes sir.

Q. How long have you been in the insurance business?

A. Eight years.

Q. I want to ask you what an annuity of \$900.00 a year would cost a man who is 23 years of age. I mean an annuity that would yield him \$900.00.

The defendant company, by its attorneys, object- to the question on the ground that it has nothing to do with the question of cost or purchase of an annuity; that only the probable expectancy of life is relevant here.

Objection sustained.

Plaintiff excepts.

216 Q. Have you with you the mortality tables that are used in this country?

A. Yes, sir.

Q. Please refer to that mortality table and turn to that part of it known as the "American experience" and tell us what is the expectancy of a man in good health at the age of 23?

A. 40.17 years.

Q. What is the present value of an annuity of \$900.00 to a man whose life expectancy is forty years?

The defendant company, by its attorneys, objects to the question on the ground that same is incompetent, irrelevant and immaterial.

(The court and counsel retire to the judge's chambers to discuss the objection, after which all return and the court reverses his former ruling based on case of Railroad v. Putnam, 118th U. S. p. 545.)

Defendant excepts.

A. \$20,577.60 in the Equitable Life of New York, Mutual Benefit, Mutual of New York and New York Life. \$18,243.00 in the American Life of Iowa, German Mutual, Hartford, Manhattan Life, Michigan State Life, Minnesota Mutual, National Life of the United States, Pacific Mutual, Prudential, Travelers, Union Central of Cincinnati, Union Mutual and West Coast Life. \$18,235.80 in the National Life Insurance Company of Vermont. That covers all of the better companies. No, the Northwestern Mutual Life Insurance Company charges \$19,431.00; Penn Mutual \$18,290.70, and

217 Phoenix Mutual Life Insurance Company charges \$18,981.00.

Q. In a previous answer that you have given you said that you had covered all of the better companies.

A. Yes, sir.

Q. All right. I would now like to ask you again what would be the cost of an annuity such as was referred to in my first question, in the Equitable Life Assurance Society of New York, the Mutual of New York and the New York Life?

A. \$20,577.60. When I said a minute ago I had given all of the better companies I overlooked the Penn Mutual and the Northwestern Mutual.

Q. Have you already answered as to the Penn Mutual and the Northwestern Mutual?

A. Yes, sir.

Q. What was your answer as to the Penn Mutual and the Northwestern Mutual?

A. \$19,431.00 in the Northwestern, and \$18,290.70 in the Penn Mutual.

Q. Now I will ask you to answer the same question as to the value of an annuity of \$900.00 a year.

Defendant renews objection.

Court makes same ruling.

Defendant excepts.

A. Equitable Life, Mutual Benefit, Mutual of New York and New York Life an \$800.00 annuity would cost a man 23 years of age \$18,311.30. The American Life of Iowa, German Mutual,

218 Hartford, Manhattan, Michigan State, Minnesota Mutual, National Life of the United States, Pacific Mutual, Prudential, Travelers, Union Central, Union Mutual and West Coast would charge for an \$800.00 annuity at age 23 the sum of \$16,296.00. The National Life of Vermont would charge \$16,209.60. The Northwestern Mutual \$17,272.00, the Penn Mutual \$16,258.40, the Phoenix Mutual would charge \$16,872.00.

Q. Now I would ask you what would be the cost of an annuity of \$700.00 at age 23 in good health.

Defendant repeats objection.

Court makes same ruling.

Defendant excepts.

A. Mutual Life, New York Life, Equitable and Mutual Benefit would charge for an \$700.00 annuity the sum of \$15,984.80. American Life of Iowa, German Mutual, Hartford, Manhattan, Michigan

State, Minnesota Mutual, National of the United States, Pacific Mutual, Prudential, Travelers, Union Central, Union Mutual and West Coast would charge \$14,259.00. National Life of Vermont \$14,183.40. Northwestern Mutual \$15,113.00, Penn Mutual \$14,226.10, Phoenix Mutual \$14,763.00.

Q. Will you please answer the same question as to cost of an annuity of \$600.00.

Defendant repeats objection.

Court makes same ruling.

Defendant excepts.

A. Equitable of New York, New York Life, Mutual Life and Mutual Benefit would charge for a \$600.00 annuity at age 23 219 the sum of \$13,718.40. The American Life of Iowa, German Mutual, Hartford, Manhattan, Michigan State, Minnesota Mutual, National Life of the United States, Pacific Mutual, Prudential, Travelers, Union Central, Union Mutual and West Coast would charge for an \$600.00 annuity \$12,222.00. National Life of Vermont \$12,157.20. Northwestern Mutual \$12,095.40. Penn Mutual \$12,193.80, Phoenix Mutual \$12,654.00.

Q. Will you please answer the same question as to cost of an annuity of \$500.00.

Defendant repeats objection.

Court makes same ruling.

Defendant excepts.

A. In the New York Life, Mutual Life, Equitable Life and Mutual Benefit the cost of a \$500. annuity would be \$11,432.00. In the American Life of Iowa, German Mutual, Hartford, Manhattan, Michigan State, Minnesota Mutual, National of the United States, Pacific Mutual, Prudential, Travelers, Union Central, Union Mutual and West Coast the cost would be \$11,180.00. National of Vermont \$10,131.00 Northwestern Mutual \$10,795.00. Penn Mutual \$10,161.50. Phoenix Mutual \$10,545.00.

Q. If you have the calculations before you from which you can give us the figures on the cost of an annuity of \$100.00 a year please tell us what they are.

Defendant repeats objection.

Court makes same ruling.

Defendant excepts.

A. Equitable, Mutual Life, New York, and Mutual Benefit 220 would charge for an annuity of \$100.00 at age 23 the sum of \$2,286.40. American Life of Iowa, German Mutual, Hartford, Manhattan, Michigan State, Minnesota Mutual, National of the United States, Pacific Mutual, Prudential, Travelers, Union Central, Union Mutual and West Coast would charge \$2,037.00. National of Vermont would charge \$2,026.20. Northwestern Mutual \$2,159.00. Penn Mutual \$2,032.30, and the Phoenix Mutual \$2,109.00.

Q. Do you know upon what rate of interest these tables are cal-

culated, the figures from which you have just given cost of annuities of different sums?

Defendant repeats objection.

Court makes same ruling.

Defendant excepts.

A. 3% except possibly the American Life of Iowa, German Mutual, Michigan State, Minnesota Mutual, National Life of the United States, Pacific Mutual, Travelers, Union Central and West Coast. These are possibly based on 3½%. Some of those I know positively are based on 3½%, and others I am not positive about.

Q. Mr. Rhoades, do you know of any way of obtaining or purchasing or buying an annuity except to buy it from some of these insurance companies that you have been testifying about, or from similar insurance companies?

Defendant objects to question on the grounds heretofore stated, and says this is not the proper measure of damages, permitting the idea that plaintiff need be expected to do nothing for balance of his life instead of doing whatever it is possible for him to do.

Objection overruled.

Defendant excepts.

221 A. There is no other way that I know of of purchasing an annuity.

Q. Are these reputable and reliable annuity companies that you have been testifying about?

A. They are life insurance companies selling annuities. There are no annuity companies in this country.

Q. Then do you know of any other way of getting an annuity except by going to these insurance companies?

Defendant repeats objection.

Court makes same ruling.

Defendant excepts.

A. No, sir.

Q. And now answer my question, are they reputable and reliable insurance companies?

A. Yes, sir.

Q. Witness is with you.

Cross-examination.

By Mr. WINGFIELD:

Q. Mr. Rhodes, the figures that you have given are based upon the average expectancy of life, are they not?

A. Yes, sir.

Q. And of course the shorter the period of expectancy the cheaper the annuities, are they not?

A. Yes, sir.

Q. Now, in allowing life insurance to train men, such as firemen, you charge them a higher premium than you do persons of ordinary occupations, do you not?

222 A. Yes, sir; would charge them a less rate for an annuity.

Q. Exactly. You would charge them a less rate for an annuity. The reason of that is, that the expectancy of life of a fireman, a man engaged in that occupation, is less than the expectancy of the average man, isn't it?

A. Yes, sir.

Q. You expect firemen to live a shorter period than the average man?

A. Yes, sir; in freight service.

Q. And the figures you have given are based upon the expectancy of forty years?

A. Yes, sir.

Q. Can you give the expectancy of a fireman in the freight service at age 23?

A. Not exactly, but it is the custom of life insurance companies to rate them up from five to eight years.

Q. To rate them up from five to eight years?

A. That is, a man 23 would take the rate of the average man about 28 or 30, and I can give you the expectancy of those ages if you want it.

Q. Well, what would be the expectancy for a man 30 years old?

A. It would be 35.33 years.

Q. The expectancy of the average man of 28 years would be what?

A. It would be 36.73 years.

Q. That is all.

223 Re-examination.

By Mr. MOORE:

Q. Mr. Rhodes, what then is the expectancy according to your insurance tables of a fireman 23 years of age?

A. As I said a minute ago, Mr. Moore, we would rate that man up from five to eight years. At 23 he would pay the rate for an average man of 28 or 30 years of age.

Q. Then we will assume that he should pay the rate of a man 29 years of age, splitting the differences. What would that be, if it would be about right, or would you feel it safer to make it 30 years of age?

A. That would depend upon the man's physical condition largely.

Q. Very well, we will just take those same figures then for a man, assuming that he is thirty years old instead of being 23 years of age, and tell us what an annuity of \$900.00 would cost?

Defendant repeats objection.

Court makes same ruling.

Defendant excepts.

The COURT: If this man were not to apply for an annuity would you rate him as a fireman if he is out of the service entirely?

WITNESS: No, sir.

A. The New York Life, Mutual Life of New York, Equitable Life

Insurance Society and Mutual Benefit would charge for a  
 224 \$900.00 annuity at age 30 \$19,161.00. The American Life  
 of Iowa, German Mutual, Hartford, Manhattan, Michigan  
 State, Minnesota Mutual, National of the United States, Pacific  
 Mutual, Travelers, Union Central, Union Mutual and West Coast  
 would charge \$17,262.00. National of Vermont \$17,174.70.  
 Northwestern Mutual \$18,198.00. Penn Mutual \$17,008.20.  
 Phoenix Mutual \$18,981.00.

Q. Now give the cost of an \$800.00 annuity on the same basis,  
 assuming that he should be rated as if thirty years of age.

Defendant repeats objection.

Court makes same ruling.

Defendant excepts.

A. The New York Life, Mutual Life, Equitable Life and Mutual  
 Benefit would charge \$17,032.00. The American Life of Iowa, Ger-  
 man Mutual, Hartford, Manhattan, Michigan State, Minnesota Mu-  
 tual, National of the U. S., Pacific Mutual, Prudential, Travelers,  
 Union Central, Union Mutual, and West Coast \$15,344.00. Na-  
 tional of Vermont \$15,266.40. Northwestern Mutual \$16,176.00  
 Penn Mutual \$15,198.40. Phoenix Mutual \$15,808.00.

Q. Answer the same question as to the cost of an \$60.00 annuity,  
 assuming that the man should be rated as if thirty years of age.

Defendant repeats objection.

Court makes same ruling.

Defendant excepts.

A. New York Life, Mutual Life, Equitable and Mutual Benefit  
 would charge \$12,774.00. The American Life of Iowa, German  
 Mutual, National of the U. S., Pacific Mutual, Prudential,  
 225 Travelers, Union Central, Union Mutual, and West Coast  
 would charge \$11,508.00. National of Vermont would charge  
 \$11,419.80. Northwestern Mutual \$12,132.00. Penn Mutual \$11,-  
 398.80. Phoenix Mutual \$11,856.00.

Q. Assuming then that he should be rated as if thirty years of age  
 tell what would be the cost of an annuity of \$100.00.

Defendant repeats objection.

Court makes same ruling.

Defendant excepts.

A. New York Life, Mutual Life, Equitable and Mutual Benefit  
 would charge \$2,129.00. American Life of Iowa, German Mutual,  
 Hartford, Manhattan, Michigan State, Minnesota Mutual, National  
 of the United States, Pacific Mutual, Travelers, Prudential, Union  
 Central, Union Mutual and West Coast would charge \$1,918.00.  
 National of Vermont \$1,908.30. Northwestern Mutual \$2,022.00.  
 Penn Mutual \$1,899.80. Phoenix Mutual \$2,109.00.

Q. That is all

Plaintiff offers Virginia annuity table found in section 2281,  
 rule of calculation found in section 2282, and example found in sec-  
 tion 2283 of the Code of Virginia.



Clerk will here copy said 3 sections of Code.

Defendant objects for reasons heretofore set out in objection to annuity figures by witness Rhodes, and because the Code sections referred to are based on calculations for dower.

Objection overruled for same reason.

Defendant excepts.

Plaintiff rests in chief.

226

*Section 2281, Virginia Code.*

SEC. 2281. Annuity table.

When a party as tenant for life, or by the curtesy, or in dower, is entitled to the annual interest on a sum of money, or is entitled to the use of any estate, or a part thereof, and is willing to accept a gross sum in lieu thereof, or the party liable for such interest, or affected by such claim, has the right to pay a gross sum in lieu thereof, or if the court in any legal proceeding decree a gross sum to be paid in lieu thereof, the sum shall be estimated according to the then value of an annuity of six per cent. on the principal sum during the probable life of such person, according to the following table, showing the present value, on the basis of six per cent. interest, of an annuity of one dollar, payable at the end of every year that a person of a given age may be living, for the ages therein stated:

Age.	Present value.	Age.	Present value.	Age.	Present value.	Age.	Present value.
0	\$10.439	26	\$13.368	52	\$10.208	78	\$4.238
1	12.078	27	13.275	53	9.988	79	4.040
2	12.952	28	13.182	54	9.761	80	3.858
3	13.652	29	13.096	55	9.524	81	3.656
4	14.042	30	13.020	56	9.280	82	3.474
5	14.325	31	12.942	57	9.027	83	3.286
6	14.460	32	12.860	58	8.772	84	3.102
7	14.518	33	12.771	59	8.529	85	2.909
8	14.526	34	12.675	60	8.304	86	2.739
9	14.500	35	12.573	61	8.108	87	2.599
10	14.448	36	12.465	62	7.913	88	2.515
11	14.384	37	12.354	63	7.714	89	2.417
12	14.321	38	12.239	64	7.502	90	2.266
13	14.257	39	12.120	65	7.281	91	2.248
14	14.191	40	12.002	66	7.049	92	2.337
15	14.126	41	11.890	67	6.803	93	2.440
16	14.067	42	11.779	68	6.546	94	2.492
17	14.012	43	11.668	69	6.277	95	2.522
18	13.956	44	11.551	70	5.998	96	2.486
19	13.897	45	11.428	71	5.704	97	2.368
20	13.835	46	11.296	72	5.425	98	2.227
21	13.769	47	11.154	73	5.170	99	2.004
22	13.697	48	10.998	74	4.944	100	1.596
23	13.621	49	10.823	75	4.760	101	1.175
24	13.541	50	10.631	76	4.579	102	0.744
25	13.456	51	10.422	77	4.410	103	0.314

## 227 SEC. 2281. Rules of Calculation.

Calculate the interest at six per cent, upon the sum to the income of which, or upon the value of the property to the use of which the person is entitled. Multiply this interest by the present value of an annuity of one dollar, as set opposite the person's age in the table, and the product is the gross value of the life estate of such person therein. (1877-8, p. 246.)

## SEC. 2283. Examples.

Suppose a person whose age is forty-two is tenant for life in the whole of an estate worth ten thousand and five hundred dollars, the annual interest on that sum, at six percent., is six hundred and thirty dollars. The present value of an annuity of one dollar at the age of forty-two, as appears by the table, is eleven dollars seventy-seven cents and nine mills, which, multiplied by six hundred and thirty dollars, gives seven thousand four hundred and twenty dollars and seventy-seven cents as the gross value of such life estate in the premises, or the proceeds thereof; then, suppose a widow whose age is thirty-six is entitled to dower in real estate worth twelve thousand dollars, interest on four thousand dollars the third part thereof, for one year, is two hundred and forty dollars, interest on four thousand dollars, which, multiplied by twelve dollars forty-six cents and five mills, the present value of an annuity of one dollar at the age of thirty-six, as appears by the table, gives two thousand nine hundred and ninety-one dollars and sixty cents, as the gross value of such dower. (1877-8, page, 246.) Va. Code—72.

228 And the defendant, in order to maintain the issue joined on its part, introduced the following evidence:—

CHARLES SILLIMAN—for Def't.

Examined in chief by Mr. WINGFIELD:

Q. Mr. Silliman, what is your occupation?

A. Civil Engineer.

Q. You were formerly employed by the Norfolk & Western Railway?

A. Yes, sir.

Q. You are not with them now, I believe?

A. No, sir.

Q. Please state whether you went to North Fork and made any measurements of the yard at that point?

A. Yes, sir.

Q. Did you make an accurate survey of the whole yard?

A. We made an accurate survey of the whole yard some time prior, but this survey covered the territory east of the coal wharf.

Q. You made this survey yourself?

A. Yes, sir.

Q. Did you have a plat prepared showing the results of the survey?

A. Yes, sir.

Q. Did you check the plat up yourself?

229 A. Yes, sir.

Q. Is that the plat that you have in your hand?

A. Yes, sir.

Defendant offers plat in evidence.

Mr. MOORE: I would like to ask a few questions explanatory of this map possibly with a view to objecting to its introduction.

Q. Mr. Silliman, you say you made the measurements yourself that are represented on that map?

A. Yes, sir.

Q. And did you make the map yourself?

A. I didn't make it all, sir. I made the notes and a part of the platting of it. Of course these maps are made with the aid of draughtsmen in the office. I was the man who made the survey in the field, and the notes, and they were brought into the office and compiled by draughtsmen. In order to be sure the map was accurate I subsequently went over it and checked it with the notes I had sent into the office.

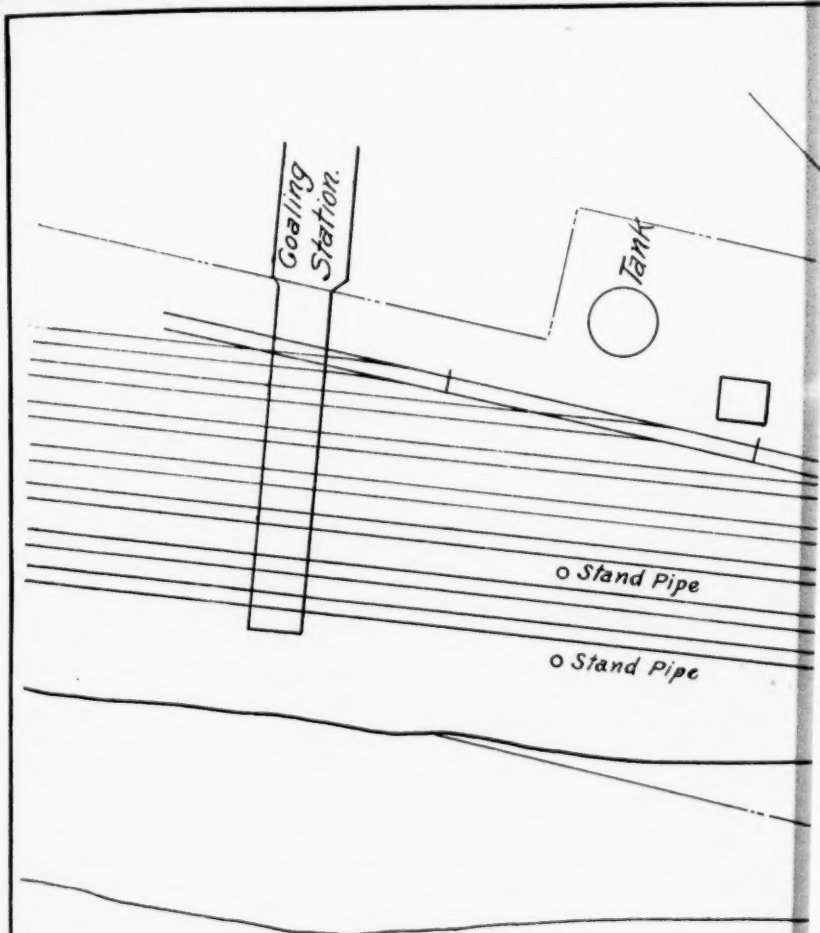
Q. You didn't make the map yourself?

A. No, sir; I didn't actually draw the lines on it but checked it, as I stated.

Mr. MOORE: We have no objection then to the map.

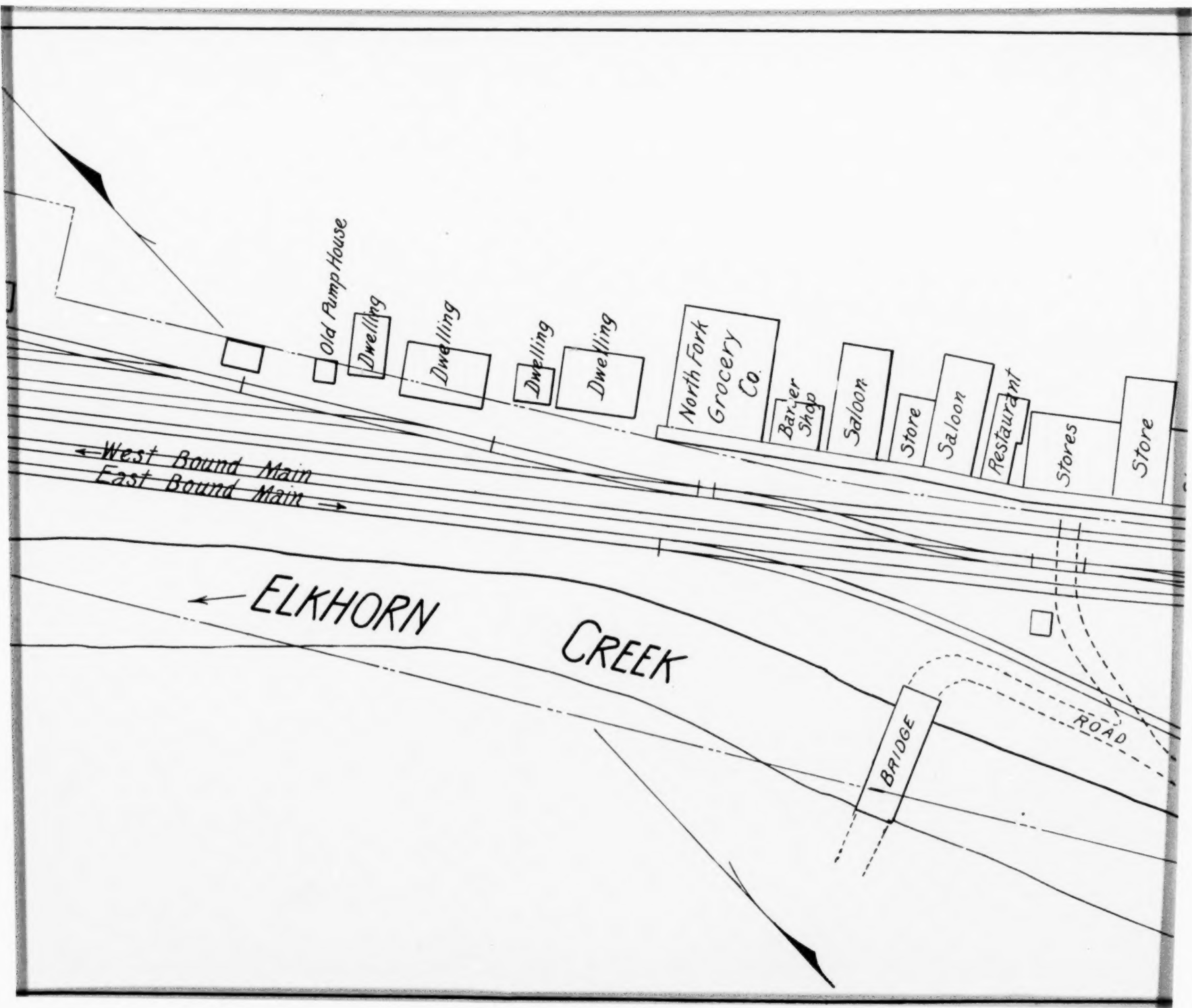
Map is introduced in evidence, and, for the purpose of identification, marked "Defendant's Exhibit B."

(Here follows map marked p. 229½.)



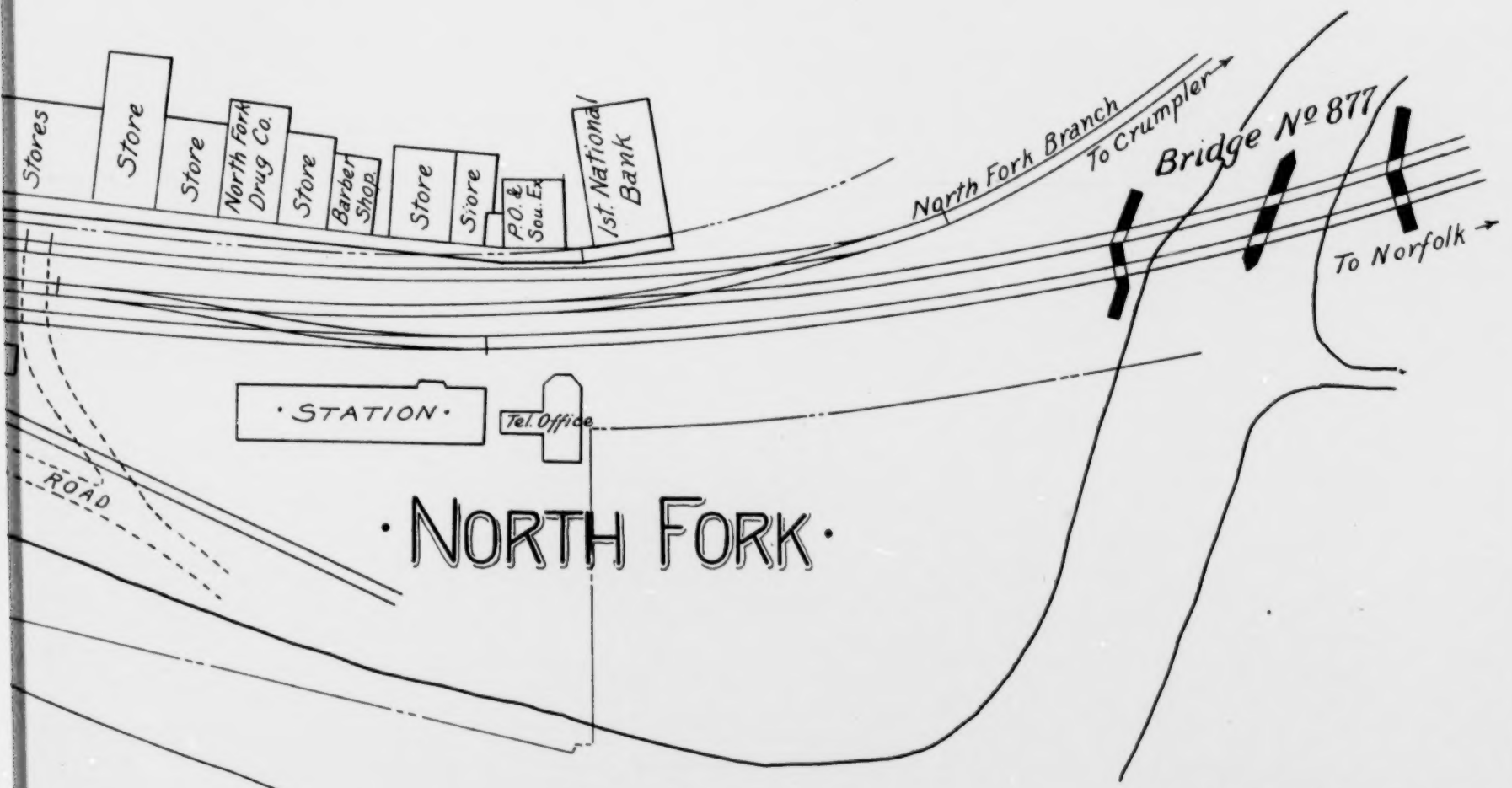
No. 153.  
N. & W. R. R. Co. } p. 229½  
v.  
Earnest.

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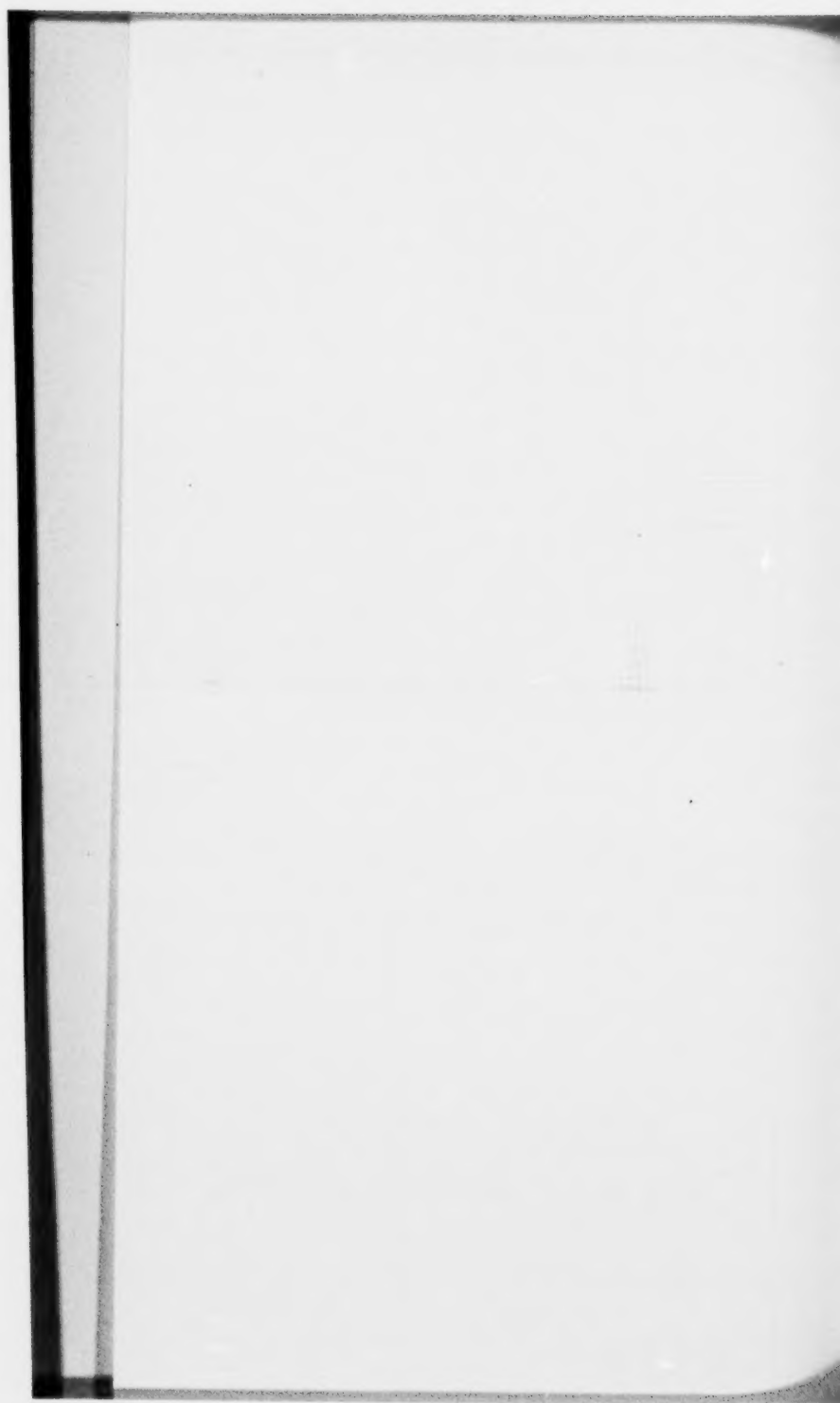


21601

D. E. EARNEST  
VERSUS  
NORFOLK & WESTERN RY. CO.  
Scale 1"=50'



Roanoke Va. March 19th 1910





Mr. WINGFIELD, resuming examination-in-chief:

Q. Mr. Silliman, the track you have in red is the track  
230 No. 3, is it?

A. Yes, sir.

Q. From the coaling station on track No. 3 to the point of the switch No. 3 is what distance?

A. About 270 feet.

Q. Does the white line right under the figure 3 on the map represent the point of the switch?

A. Yes, sir.

Q. Then from switch No. 3 to switch No. 2 is what distance?

A. 130 feet.

Q. The point of switch No. 2 is represented by the white line under the figure 2?

A. Yes, sir.

Q. Witness is with you.

No cross-examination.

(Witness leaves stand.)

231 D. E. EARNEST, the Plaintiff, recalled for further question on cross-examination.

By Mr. SMITH:

Q. Mr. Earnest, in speaking of the artificial limb that was furnished you by the Norfolk & Western Railway Company I notice it is spoken of in the record as a wooden leg. It is an artificial leg, is it?

A. Yes, sir.

Q. What is it made of?

A. It is made of some kind of wood, I forget now of what but some kind of willow.

Q. It is an approved artificial limb, is it?

A. Yes, sir.

Q. And the kind you asked for?

A. Yes, sir; I asked for an artificial limb and this is the kind, I suppose.

Q. That is all.

(And witness leaves the stand.)

232 JOHN DRAWBOND—for Defendant.

Examined in chief by Mr. SMITH:

Q. What is your name?

A. John Drawbond.

Q. What is your business, Mr. Drawbond?

A. Engineer.

Q. How long have you been an engineer?

A. About nine years, going on nine years.

Q. Were you a fireman before you were an engineer?

A. Yes, sir.

Q. How long were you a fireman?

A. About three years and four months, to my best recollection.

Q. Well, in the service of what company were you?

A. Norfolk & Western.

Q. Both as fireman and as engineer?

A. Yes, sir.

Q. Do you recall the accident to Mr. D. E. Earnest?

A. Yes, sir.

Q. Were you the engineer in charge of the engine when that accident happened?

A. Yes, sir.

Q. What was the number of that engine?

A. 893.

233 Q. Well, state to the jury what you were called upon to do, and what preparation you made for carrying out your work that night.

A. We were called to report that night at eleven o'clock to push train 82. We received our engine on No. 3 track at North Fork. After we got the engine ready to go out Mr. Earnest and myself was both standing in the pit together on the tank of the engine. After we got the engine ready Earnest took his torch and get down on the left side of engine and went to No. 3 switch, threw the switch and gave me signal to come ahead. I then started the engine, and when we come to No. 2 switch I struck Earnest.

Q. You what?

A. That is where I found Earnest under the engine, at No. 2 switch.

Q. Well, where did he signal you from to come ahead?

A. At No. 3 switch.

Q. On which side of the track was he?

A. On the left side.

Q. Did you start your engine then?

A. Yes, sir.

Q. Well, how were you running at what rate of speed were you going with your engine?

A. I wasn't exceeding four miles an hour, running very slow.

Q. You were running very slow?

A. Yes, sir; a man could have walked and kept ahead of me.

234 Q. Well, when you got to No. 2 switch how was your engine going then?

A. At No. 2 switch?

Q. Yes.

A. I stopped right on No. 2 switch.

Q. You stopped right on No. 2 switch?

A. Yes, sir.

Q. How come you to stop?

A. I heard Earnest holloa.

Q. Did you see him on the track in front of your engine?

A. No, sir; I didn't.

Q. Well, what did you do when you heard him holloa?

A. I stopped the engine as quick as I could and got down off the engine and went to him.

Q. State to the jury how you stopped the engine?

A. I shut off the throttle and put on the brake in emergency. I got right down off the engine and went straight to Earnest. I found Earnest with the pony trucks of the engine standing on his left shoe heel, and Earnest told me that his leg was cut off, but I told him it wasn't that it was just on his heel, and he said it was the other leg, and I looked at the other leg and found it had been run over, and I then moved the engine back off of Earnest and came back to him again, and got him away from the track, between No. 2 and No. 1 track, and I said "My God, Earnest, what was the matter with you?" He said he didn't know, that he was just  
235 walking along there looking for his brother to wave at him on train 82. He also said he didn't—

The plaintiff, by his attorneys, objects to what was told witness as being hearsay.

The defendant company, by its attorneys, replies that admission against interest is legal evidence.

Objection overruled.

Plaintiff excepts.

Q. Go ahead and tell what Earnest said to you after you had gotten him off the rail.

A. After I got him off the rail he said that he was walking along there looking to wave at his brother on 82. He also said he didn't censure me with the accident.

Q. Was there anything else said that you now recall?

A. No, sir. I went then after a doctor, and to get some help to take him to the office.

Q. Where did you go to?

A. I went to the telegraph office and yard office.

Q. How far was that?

A. Something like 200 yards I think; 150 or 200 yards.

Q. Did you get any help?

A. Yes, sir; Yard Master Harrison, who was there, and Mr. Keith, the train master or assistant trainmaster rather, was right in the office at the time, and I don't know how many others, but there was lots of others in there.

236 Q. Then did you return to Earnest?

A. Yes, sir; with the crowd.

Q. What doctors were gotten to see him?

A. Dr. Kelly was the first doctor I met. I met him right at the door as I came out. After telling those fellows about it I met Dr. Kelly. They had had a lodge or something over there, and it just had broken up, and I met him. They had already ordered Dr. Cook, but Dr. Kelly came and I told him about it.

Q. Did he go down to see Earnest?

A. He went in the office. They were already going to bring him up.

Q. Did you or not help to bring him up to the office?

A. No, sir; I never helped bring him up to the office. I didn't quite get back to where they were before they picked him up, and I came on up with the crowd that carried him.

Q. Was there anything said about going to the hospital?

A. Yes, sir; he asked me to go to the hospital with him, and also to beg his brother to quit.

Q. To quit what?

A. To quit firing.

Q. Well, did you go with him to the hospital that night?

A. Yes, sir.

237 Q. Where did the doctors have him fixing him up before they sent him to the hospital?

A. Had him in the office at North Fork, yard office.

Q. Were you in there?

A. Yes, sir.

Q. Do you recall his saying anything more about the accident after he got in there?

A. Yes, sir; there he said the same thing.

Q. What did he say in there?

A. He said he didn't censure me for the accident. He also asked me if I was going to the hospital with him, in the office when they were working on him.

Q. How long was it before they got him ready to start to the hospital?

A. I think it must have been something near one o'clock when they left there.

Q. He has a brother, did he get back there before Earnest left there?

A. Yes, sir; his brother came back. They waited until he went over and got some clothes.

Q. Where did he go to get some clothes?

A. Over there at the boarding house, where he was boarding at North Fork.

Q. To go back to where you left the coal wharf: Where was your engine standing there?

A. Standing on No. 3 track.

Q. Where with reference to the coal wharf?

238 A. Standing right under the coal wharf, the tank under the coal wharf.

Q. How long is the engine, do you know?

A. Not exactly, no sir.

Q. You know about its length?

A. Yes, sir.

Q. Well, state it.

A. The engine without the tank?

Q. Yes.

A. Counting tank and all, or just the engine?

Q. The engine.

A. The engine is about 35 feet.

Q. Was the whole of the tank under the coal wharf?

A. Yes, sir.

Q. Was any part of the engine under the wharf?

A. A little of the cab was under the wharf.

Q. Which way did Earnest go when he left the cab?

A. He left from the left side.

Q. Which way did he go, up between the rails or up along the rails on the outside?

A. He went up between No. 3 and No. 2 tracks. When he got off the engine he got off between No. 3 and No. 4 tracks, and he walked on up to No. 3 switch.

Q. Between No. 3 and No. 4 tracks?

A. I say he got off the engine between 3 and 4 tracks, on that side. On that side would throw him on No. 4 track. He walked on up to No. 3 switch.

Q. Between 3 and 4, or between 2 and 3 tracks?

239 A. Between 3 and 4.

Q. You said awhile ago between 2 and 3 tracks, but you didn't mean to say that?

A. No, sir.

Q. Did he cross over the track anywhere between you and the switch?

A. Cross the track I was on?

Q. Yes.

A. No, sir.

Q. When he got to the switch did you see him change the switch?

A. Yes, sir.

Q. When he changed the switch state whether or not he gave you signal at the switch or near the switch and on the same side of the track as the switch, or whether he crossed over and gave you signal on the other side?

A. He gave me signal from the left side, and was walking on up from the left side. He didn't cross over at all.

Q. What did he do after he gave you signal and was walking on towards the other switch?

A. He was walking on towards the other switch.

Q. What did you do then?

A. Started the engine.

Q. Had you started the engine before that?

A. No, sir.

Q. Where was Earnest walking when you saw him leave the switch?

240 A. Walking on the outside of the track.

Q. Well, Mr. Drawbond, state whether or not there is a path along there on the outside of the track at that point?

A. Yes, sir; there is a path all the way from No. 3 to No. 2 switch, all the way up to the town as far as that is concerned.

Q. What kind of path is it?

A. Why, it is a good big path. People use it that live there on the hill.

Q. Well, is it rough or smooth or how?

A. No, it is smooth path all right, level as the railroad.

Q. Well now, did you see Earnest after he left No. 3 switch?

A. No, sir.

Q. What prevented you from seeing him, anything?

A. I had the cylinder cocks on the engine open.

Q. Explain to the jury what that is.

A. The cylinder cocks are put in an engine to drain the cylinders. If an engine stands any length of time the cylinders will run full of water, and they have got to be drained, so you open the cylinder cocks to drain them.

Q. Well, when you open the cylinder cocks what is the effect of that?

A. Well, that would obstruct the view, looking through the steam.

Q. Now, the members of the jury are not supposed to  
241 know how that obstructs the view, can't you tell them?

A. Yes, sir. When the cylinder cocks are open the steam escapes through the cylinder cocks along each side of the track.

Q. Well, how does it obstruct the view on the side of the track.

A. Well, the steam would naturally hit anything, the earth or anything would throw the steam up from the ground.

Q. The steam would rise then, would it?

A. Yes, sir.

Q. Would that steam go out in front of the engine?

The plaintiff, by his attorneys, objects to the question because leading.

Objection sustained.

Q. Where does the steam go?

A. Where does it go?

Q. Yes.

A. It comes from the cylinder cocks and out into the atmosphere.

Q. What part of the engine does it go to?

A. Goes out of the cylinder cocks.

Q. How does it obstruct the view?

A. Why because it rises in front of you.

Q. Mr. Drawbond, where were you on the engine?

A. I was on the engineer's side.

Q. What was your position?

242 A. I was sitting on the seat looking ahead.

Q. Is that the position for the engineer to be in?

A. Yes, sir.

Q. What did you have your hand on?

A. Had my hand on the throttle.

Q. What is the throttle?

A. The thing to start the engine with.

Q. Is the throttle the lever—

A. That turns steam into the cylinders.

Q. How do you use that to turn steam into the cylinders?

A. Open the throttle.

Q. And you do that to start the engine?

A. Yes, sir.

Q. And what do you do to stop the engine?

A. Shut the throttle off and apply the brakes.

Q. Now, you have stated that you opened the cylinder cocks. Is there any necessity for opening the cylinder cocks when you start an engine up that way?

A. Yes, sir; if you didn't open the cylinder cocks there would be danger of knocking the cylinder heads out of the engine. It is always necessary to drain the cylinders when you receive an engine that has been standing any time.

Q. Well, is that necessary, to open the cylinder cocks?

Plaintiff, by his attorneys, objects to question as leading.

Objection sustained.

243 Q. Well, was it customary to open the cylinder cocks when you started that engine as you started it on that occasion?

A. Yes, sir.

Q. How long had you been working in that yard in pusher service?

A. I had worked in pusher service at different times. I have been in the service, or had been at that time I think something like nine months.

Q. Was that all?

A. Yes, sir.

Q. And had you been in the pusher service before from that yard?

A. Yes, sir; off and on for six years.

Q. Well, state what was customary in reference to firemen piloting an engine out, as to his signalling you ahead, etc.

A. Well, when they wanted to go out, and whenever we got an engine ready he always went and opened the switch. If we were standing on the lead he would go on and throw the main line switch and go to the opposite side of the track.

Q. Where did the fireman go?

A. Where does he go?

Q. Yes.

A. When that main line switch is thrown?

Q. No, when he threw the first switch.

A. He goes on to the main line switch.

244 Q. And what did you do, what does the engineer do?

A. He follows him on up to the main line.

Q. Your fireman goes in front and you follow him along?

A. Yes, sir.

Q. Is it customary to wait for any other signal?

A. No, sir.

Q. Except the signal when you start?

A. It isn't customary and I had never seen it practiced.

Q. It isn't customary and you have never seen it practiced?

A. No, sir.

Q. State whether or not you were running your engine out there that night when this accident happened in the same manner that was customary at that point with that kind of service?



A. Yes, sir; I brought it out like I always did.

Q. Was it customary for the fireman to pilot you out always?

A. In pusher service we didn't have anything but the fireman.

Q. In pusher service who was connected with the engine?

A. The engineer and fireman.

Q. Nobody else?

A. That is all.

Q. Mr. Drawbond, state to the jury whether or not the  
245 fireman had time, moving your engine as you were doing  
that night, to keep on in front of the engine and line up the  
switches?

The plaintiff, by his attorneys, objects to the question because calling for the opinion of the witness while he contends witness should state the facts only.

The COURT: An opinion by this witness as to whether or not the fireman had time under the circumstances there that night to get out of the way of the engine might be objectionable, but a speed of four miles an hour does not necessarily convey any very definite impression to the minds of people who are not accustomed to estimating speed, and therefore who do not really understand how fast or how slow it is. Therefore I do not think this question asks an opinion in the sense that would be illegal—to say whether the speed at which the engine was moving was such a speed as would permit a man walking to keep safely ahead of the engine. Objection will be overruled.

Plaintiff excepts.

A. Yes, sir; he had plenty of time.

Q. Mr. Drawbond, when the fireman reached the switch what did he have to do if the switch was lined up all right?

A. He didn't have to do anything, only look at it and walk on by.

Q. Look at it and walk on by. Would that take any perceptible time to stop?

A. He wouldn't have to stop.

Q. Now, what was the condition of the switches after you got out on the lead, generally? Were they generally so that the fireman had to change them, or were they generally lined up so that  
246 he wouldn't have to change them?

A. Most of the time lined up to the lead.

Q. What do you mean by "most of the time."

A. I say the most of the time they would be lined for the lead. Sometimes they would have one against you; somebody had set a car in on one track and gone off and left it and they would be wrong.

Q. Generally they would be lined up for the track you were on. That is what you mean?

A. Yes, sir.

Q. And you mean by saying they were lined up that they were in position for you to pass over them?

A. Yes, sir.

Q. Did you know that Earnest's brother was on the train pushing No. 82 until he told you?

A. No, sir.

Q. Mr. Drawbond, you said that the pilot wheel was on the heel of the shoe of Earnest when you got to him.

A. Yes, sir; the pony wheel of the engine was on Earnest's heel when I got to him.

Q. What wheel of the engine is the pony wheel?

A. The front one.

Q. Why is it called a pony wheel?

A. Because it is smaller than the balance.

Q. It is a small wheel, is it?

A. Yes, sir.

Q. How far is that wheel located from the front of the engine?

247 A. About 4 feet and 7 inches from the tip of the pilot.

Q. From what part of the pilot?

A. From the tip of the pilot, the pony truck is about 4 feet 7 inches.

Q. What do you mean by the "tip of the pilot"?

A. The end of the pilot.

Q. Do you mean the sharp end of the pilot?

A. Yes, sir.

Q. When you heard Earnest halloo did you at once attempt to stop your engine?

A. I stopped as quick as I could, yes sir.

Q. How far do you think you went after you tried to stop it?

A. I couldn't have run over about four feet and seven inches, unless he screamed before I got to him. I never tried to make the stop until I heard him scream.

Q. Well, now, in reference to the switch No. 2, where was Earnest's heel on the track?

A. It was on the rail.

Q. Well, where?

A. Under the wheel.

Q. Well, in reference to the switch, I asked you?

A. Oh, his foot was right at the switch point of No. 2 switch.

Q. Do you mean that it was immediately at the switch point?

A. Yes, sir; right at the needle point.

248 Q. Right at the needle point of No. 2 switch?

A. Yes, sir.

Q. Is the needle point right opposite the switch lever?

A. That is near about it.

Q. What do you call that bar that runs between the ties that connects the track so as to pull the track in making the switch?

A. The bridle rail.

Q. Where was he with reference to the bridle?

A. Just a little bit ahead of the bridle.

Q. What do you mean by "a little bit ahead of the bridle?"

A. Something like that. (Measuring off two or three inches.)

The bridle sets in about four inches of the point, and he was just above the bridle.

Q. Mr. Drawbond, from your position in the engine that you occupied, and which was the usual position as I understand you, how far could you see a man come on the track from the left side in front of your engine?

A. About 73 feet.

Q. Were there any lights on your engine?

A. Yes, sir; a head light and two classification lamps and a tail lamp.

Q. Where was the headlight, where is it usually on an engine, on what part of it?

A. In front.

249 Q. Where did that light reflect light, what did it show?

A. What did it show?

Q. Yes, what is it intended to reflect light on?

A. To reflect light on anything, on the switches or anything.

Q. Well, does it or not throw light or reflect light on the track ahead of the engine?

A. Yes, sir.

Q. How far ahead usually does it reflect light?

A. Oh, something like 75 or 80 feet.

Q. Is that all a head light reflects light ahead of the engine?

A. That is about all the engineer could see there.

Q. You mean that you couldn't see more than 75 or 80 feet ahead?

A. By the headlight?

Q. Yes.

A. The best reflection of the headlight you got would be about 75 or 80 feet ahead of the engine.

Q. What kind of headlight did you have, oil or electric?

A. Oil.

Q. And that would reflect light about 75 or 80 feet ahead of the engine?

A. Yes, sir.

Q. Is that as far as the engineer could see any objects on the track?

A. Oh, he could see a big object a farther distance than 250 that by the headlight.

Q. Well, an object the size of a man, how far could he see that on the track?

A. Well, he ought to see a man something like 150 feet.

Q. Mr. Drawbond, were you late getting to your engine that night or were you on time?

A. I was on time.

Q. Was Earnest there ahead of you, and did he do all your work?

The plaintiff, by his attorneys, objects to the question because leading?

Objection sustained.

Q. Well, state whether or not you did your work that night or not?

A. Yes, sir; I done my work.

Q. Before your engine started?

A. Yes, sir, but Mr. Earnest was there when I come.

Q. When you came there did you know what you had to do?

A. Yes, sir.

Q. How did you get that information?

A. I received instructions over the telephone.

Q. When was that before you got to your engine or after you got to your engine?

A. That was after I got the engine ready.

Q. Well, tell the jury about it. They do not know anything about it.

251 A. Well, when you report the first thing you do you get the engine ready to go out, and then go down to the phone and ask for instructions, and they tell you what to do.

Q. Did you do that that night?

A. Yes, sir.

Q. That is all.

Cross-examination.

By Mr. MOORE:

Q. How far did you live from where you had to take your engine out that night?

A. I guess it must have been something like 500 yards. It is right close by, at a place known as Tony's Hill, and I don't know exactly the distance.

Q. At what time did you receive this notice you are talking about that you had to take your engine out?

A. Just about 11.15.

Q. Well, did that notice notify you that you had to assist or push a train up the grade?

A. Yes, sir.

Q. Did that notice also notify you that Mr. Earnest would be on your engine?

A. Which Earnest?

Q. The plaintiff here?

A. No, sir.

252 Q. I didn't know whether the notice was one to both you and Earnest or just to you alone?

A. I don't understand the question exactly.

Q. Now, was the notice to you and Earnest or just to you alone?

Mr. SMITH: What notice are you talking about?

Mr. MOORE: The notice witness received to go on duty.

Mr. SMITH: I think the witness is understanding you to mean telephone notice.

WITNESS: Certainly.

Mr. SMITH: You are talking about his being called to go out. He had instructions over the telephone; he understood you to be asking about those instructions.

Q. Very well, I will ask you about the instructions. What did you mean when you said you had notice?

A. I never said I had notice. I said I received instructions over the telephone to push that train.

Q. Did those instructions embrace the name of Earnest too?

A. No sir.

Q. When did you know that Earnest was to be with you?

A. I knowed that before I ever went to the engine.

Q. You did.

A. Whenever they called you you know you have to register the engineer and the fireman. The engineer registers the fireman he gets, and they give him the name of the fireman at the office.

Q. Had you done that?

253 A. Yes, sir.

Q. Well then, you didn't go straight from your home to the engine?

A. To the engine?

Q. Yes.

A. No, sir; I went to the office and registered out, which is the first thing you do.

Q. What time was it when you registered out at the office?

A. Eleven o'clock.

Q. Do you remember whether or not you were due to be at your engine at the time you registered out?

A. Do I know whether I was due to be at it?

Q. Yes.

A. I was due to be at it as soon as I registered out.

Q. You registered out before you left the office to go to your engine?

A. I was due at the office at eleven o'clock to register, and then to go to the engine.

Q. At what time were you expected to get to your engine?

A. Well, just as soon as you register and can walk to it. They call you to report at a certain time, and my reporting time was eleven o'clock.

Q. Does that mean reporting at the office or at the engine?

A. Yes, sir; that means reporting at the office and register out at eleven o'clock.

254 Q. Well, as a matter of fact, did you get to the office by eleven o'clock?

A. Yes, sir.

Q. You register out at eleven o'clock?

A. Yes, sir.

Q. Let me ask you this question then: How far is it from the office to where your engine was standing?

A. Oh, I guess something like 200 feet maybe.

Q. 200 feet?

A. Probably farther. I don't know exactly the distance.

Q. It may be something like 200 feet from the office to the engine?

A. Yes, sir.

Q. Is that according to your best recollection?

A. Yes, sir.

Q. Well, how long did it take you to walk from the office to the engine?

A. I don't know exactly how long it would take.

Q. Well, is it any farther by the railroad track back to the office than it was the way you walked?

A. Any farther by the railroad track from the office?

Q. Yes, the way you came back with your engine on the track, would you have to travel any farther to get back to the office or a point opposite the office on the railroad track than you would have to travel when you walk?

A. I don't understand what you are asking.

255 Q. You have just told us it was 200 feet from the office to your engine. Now when you came back from your engine you came back to the office, or to a point just opposite the office, didn't you?

A. Came back to the office, yes sir.

Q. Was it any farther by the railroad track back to the office the way you came with your engine than it was the way you walked from the office up to the engine?

A. I walk the same way, in going from the office to the engine and from the engine to the office.

Q. Then you would travel about 200 feet in going from the office to the engine walking, and would travel about 200 feet in going back to the office on the engine?

A. On the engine?

Q. Yes.

A. Moved the engine, do you mean?

Q. Yes.

A. No, sir.

Q. If that isn't right why not?

A. I never brought the engine back to the office. The office was below the engine, and the engine went out the other direction.

Q. When you speak of the office do you mean the railroad station or the telegraph office?

A. No, sir; I mean the office we register at, kept for engineers and firemen.

Q. That is a different office.

A. Yes, sir; different altogether. It sets right below the coal wharf.

256 Q. Then you walked 200 feet from the office to your engine?

A. Yes, sir.

Q. How soon did you start after you got on the engine?

A. Just as soon as I could get it right.

Q. How soon after you got to the engine did you start?

A. I don't know exactly. I got my engine ready and looked around it and oiled it. It takes something like eight or ten minutes.

Q. Well, had Earnest done any of your work when you got there?

A. I don't remember that he had.

Q. Was the engine in the usual good condition to go out?

A. Yes, sir; she was as good as the average engine.

Q. She was as good then as the average engine. Well, they have good equipment there, have they?

A. Very good I guess.

Q. Did you have to do anything to the lubricator?

A. No, sir; not as I remember.

Q. When did you turn the oil in the lubricator after you got to the engine?

A. When do you?

Q. When did you turn the oil in the lubricator after you got to the engine?

257 A. Before starting. It isn't necessary; you can turn it in a mile up the road, as far as that is concerned. It wouldn't be absolutely necessary to start the lubricator before the engine started.

Q. You can turn the oil in the lubricator after you get a mile up the road?

A. Yes, sir; if you wanted to.

Q. Well, that wasn't my question, however. I asked you this question: When did you turn the oil into the lubricator that night?

A. I don't remember.

Q. It is all right though to turn it into the lubricator after you get a mile up the road?

A. Any time. You wouldn't turn the lubricator on just as soon as you started.

Q. What is your practice about turning oil into the lubricator?

A. What is it?

Q. Yes.

A. Generally always before I start.

Q. Do you have to do any other work in the way of regulating it?

A. Yes, sir; after you start the lubricator there are feeds to feed the cylinders and also air pump, three feeds. You turn them all on. You don't use them at all while standing; it is for when the engine is running. You are not supposed to feed oil in the cylinders of a standing engine.

Court adjourns until tomorrow morning at nine o'clock.

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TUESDAY, June 28, 1910.

Morning Session.

Court reconvened nine o'clock pursuant to adjournment on yesterday.

JOHN DRAWBOND—A witness introduced by defendant, examined in chief and cross-examined for a time on yesterday, resumes the stand for conclusion of cross-examination.

By Mr. MOORE:

Q. I believe you stated on yesterday that sometimes the switches would be against the engineer in going out of that yard?



A. Yes, sir.

Q. I suppose that comes about because of the fact that you have four switches there that lead off from the lead. Is that right?

A. Yes, sir.

Q. And I presume that trains, or cars, or engines perhaps, during twenty-four hours are constantly dropping in at first one switch and then another, No. 1, No. 2, No. 3, or No. 4, as the case may be. Is that right?

A. Those are the tracks, yes sir.

Q. Yes, those are the tracks. Those switches, No. 1, No. 2, No. 3 and No. 4 all go west off the lead, don't they?

A. All lead west?

259 Q. All lead west from the lead track?

A. Away from the lead?

Q. Yes, away from the lead towards the west.

A. They lead towards the east.

Q. They go away from the lead?

A. Yes, sir.

Q. And the lead was the track you were to go into the main line on after you got off No. 3?

A. Yes, sir.

Q. The reason why you explained that sometimes switches were closed against the engineer was because I presume that trains or engines during twenty-four hours might be constantly dropping back into those switches. Is that right?

A. Pusher engines would drop back in there sometimes, and also they would set off cars in there.

Q. Wouldn't pusher engines very often drop back in there to clear?

A. Yes, sir.

Q. To get rid of the main track?

A. Yes, sir.

Q. Do they use switches Nos. 1, 2, 3 and 4 for cars?

A. No, sir; hardly ever use 3 and 4 for cars.

Q. They use 1 and 2 for cars mostly?

A. Yes, sir.

Q. About how many engines were there that would likely drop back in there during twenty-four hours?

260 A. Now, I couldn't say. Sometimes five and six, and sometimes there wouldn't be but one.

Q. Did you have as many as fifteen or twenty engines at work about those yards at the time?

A. Yes, sir.

Q. Wasn't it because of the case that on busy occasions there might be fifteen or twenty engines within twenty-four hours that might drop back in on either one of those switches either to clear the main line or to stand there?

A. No, sir; if they had cars they would set the switch for the lead. The pusher men would be the only men to leave them. Engines were supposed to leave them for the lead except the pusher men.

Q. Whenever they dropped back on to No. 1, and from 1 to 2 and 3, off the lead, wouldn't they leave the switch open so as to connect with the lead?

A. The pusher would, yes sir.

Q. So that was the reason then you had for saying on yesterday that some of those switches might be against the engineer?

A. Might be, yes sir.

Q. Well then, if the switchman, and in this case your fireman was acting as switchman, could get to No. 2 and find that it was against him what would be his duty with reference to it?

A. To throw it.

261 Q. To throw it?

A. Yes, sir.

Q. Suppose he would get to it and find that the lever wouldn't work, or find some trouble with it, what would be his duty then?

A. It would be his duty to wave you down.

Q. To wave you down would be the signal, would it?

A. Yes, sir.

Q. Suppose then he would get down to No. 1 and find that there was something wrong with it, and he couldn't get it to work, what would be his duty then?

A. It would be his duty to wave you down.

Q. Well now then, supposing he was back at No. 2 and he had to wave you down, and you stopped until he got the switch fixed, and you had to run up say within 75 feet or a less distance of him, and he had fixed the switch, then what would he do?

A. If he had done how?

Q. Suppose you had run up to within a distance of less than 75 feet of the switch, and he had fixed the switch, then what would he do?

A. He would go on to the next switch and set it.

Q. And leave you standing there on the track?

A. It wouldn't be necessary for you to stop.

Q. You didn't get my question then. In the first place you tell us if anything was wrong with it when he got there and he  
262 could not fix it quickly he would wave you down. Is that right?

A. Yes, sir.

Q. Then suppose you stopped then within 25 feet of the switch when he waved you down, what would he do after he had succeeded in fixing the switch?

A. If I had stopped and he had fixed the switch?

Q. Yes, if you had stopped within 25 feet of the switch what would he do then?

A. He would give me signal.

Q. What would that signal be?

A. If he wanted me to come ahead he would give me signal to come ahead. (Indicating by waving hand up and down.)

Q. If you had run up to within 25 or 50 feet of that and he had gotten the switch ready, and worked the lever bar from the left side

of the switch as was the case in this instance, where would he go to give you signal?

A. It isn't necessary for him to go anywhere.

Q. He could stand there on the left side with you within 25 or 50 feet of him and give you signal. Is that right?

A. I don't know as I could have seen signal from the left side within 25 feet of me.

Q. You couldn't have seen it then?

A. No, sir.

Q. What would he have done?

263 A. He would have to have gone on the other side.

Q. If you had been within fifty feet of him could you have seen the signal?

A. It was according to where he had been standing.

Q. Didn't you tell us on yesterday you couldn't have seen the signal if he had been less than 73 feet away from you?

A. I said you can see a man come on the rail 73 feet from me, on the left rail.

Q. If he had been on the left side still, on the left rail, you couldn't have seen him 75 feet ahead of you?

A. No, sir.

Q. If you had been 73 feet from him he would have had to step across to the right hand track to give you signal?

A. Yes, sir.

Q. Well now, you told us on yesterday that you two met at that engine down at the coal wharf?

A. Yes, sir.

Q. And it is in evidence that the coal wharf was 270 feet from switch No. 3. And you told us, if I am not mistaken, that you were on your engine at the coal wharf 270 feet away from switch No. 3, and when he set switch No. 3 he gave you signal to come forward. Is that right?

A. Yes, sir.

Q. Then you told us on yesterday that you never saw him  
264 any more until you heard him halloaing, and got down and took him out from under the engine at No. 2?

A. I never seen him any more after I started the engine.

Q. Well, you told us on yesterday that you were sitting on your engine, and the engine was standing still at the coal wharf, with a part of the cab back under the coal wharf, and he gave you signal at No. 3. Isn't that right?

A. Yes, sir.

Q. Then when he gave you signal at No. 3 you never saw the man any more until you ran over him at No. 2, and you heard him halloaing, and got down and got him out from under your engine. Is that right?

A. Yes, sir.

Q. Now, it is in evidence that No. 2 is 400 feet from where you started that engine. So you never saw the man from the time you started that engine until you had run it 400 feet and heard him halloaing and got down and got him out from under it?

A. About 350 feet I think.

Q. Let's see if it is 350 feet. It is in evidence that it is 130 feet from switch No. 3 down to switch No. 2. Isn't that right, by your map here?

A. About 240 feet I think to switch No. 3, and about 350 feet from where the engine started to switch No. 2.

Q. How far is it from where your engine started to switch No. 3?

265 A. To switch No. 3?

Q. Yes.

A. About 240 feet.

Q. You say your engine was back under that coal wharf?

A. Yes, sir; standing back a little bit under the coal wharf.

Q. Now then, it is in evidence that that coal wharf was 270 feet from switch No. 3. Then it is in evidence that switch No. 2 was 130 feet farther on. That makes 400 feet. I will state that whether you make the calculation or not. It is a fact then that you did not see Mr. Earnest from the time you started your engine at the coal wharf until you heard him halloaing at No. 2 and got down and pulled him out from under the engine. Isn't that a fact?

A. I never seen him until I heard him halloaing.

Q. Answer so the jury may hear you.

A. I never seen him until I heard him halloaing.

Q. Then you took him out at switch No. 2, didn't you?

A. Yes, sir.

Q. Now let me ask you this question: Suppose switch No. 2 was against you that day, just like you have explained to the jury the switch might have been against you, and that Earnest was there working at it trying to turn it so you could go through it, and found he could not turn it, and had given you a signal  
266 to stop, would you have seen that signal?

Defendant company, by its counsel, objects to the question because not based on any evidence introduced in this trial but is an imaginary case pure and simple. Let the witness state the facts and the jury draw therefrom any proper inferences.

Objection sustained.

Plaintiff excepts.

Q. Well, suppose then that these switches were against you, as you have explained, and it required time to adjust them you say the fireman would have given you a stop signal?

A. Yes, sir.

Q. What was it that started you away from the coal wharf?

A. What would do what?

Q. Yes.

A. I don't understand you.

Q. How came you to move your engine at the coal wharf?

A. Because we were ready to go.

Q. Was any signal necessary to you to start your engine at the coal wharf?

A. I don't know that it was really necessary for a signal, but I got a signal at No. 3 switch.

Q. What did that signal at No. 3 switch indicate?

A. That that switch was all right and to come ahead.

Q. Would you have run over No. 3 if you hadn't got the signal?

267 A. And the fireman had gone on?

Q. Would you have run over No. 3 if you hadn't gotten signal?

A. Well, I couldn't say if the fireman had gone on that I would have gone over the switch without a signal. But if I had seen the fireman pass No. 3 switch I would have gone on without any further signal.

Q. That is all right then. If you had seen the fireman pass No. 3 switch you would have gone on without any further signal?

A. Yes, sir.

Q. Why were you trying to pass No. 2 switch without seeing him go on or without signal?

A. Because he had plenty of time to set the switch, and if there had been anything the matter with the switch he would have waved me down.

Q. How could you have seen him wave you down if you hadn't seen him from the time your engine left the coal wharf until you found him on No. 2?

A. How would I have seen him?

Q. Yes, sir; if he had waved you down at No. 2?

A. As far as that is concerned he could have halloaed.

Q. Then when he got down to No. 2 he could have halloaed to you to stop the engine?

A. Yes, sir.

Q. You have a signal by halloaing?

A. Yes, sir.

268 Q. Is it in your book of rules?

A. To holloa?

Q. Yes.

A. No, sir; I don't know as there is any rule particularly for it.

Q. Would you have been likely to have heard him halloaing with trains running by and the noise of your own engine, and perhaps the screaming of some of the other twenty-five engines?

A. Yes, sir; if he had halloaed loud enough I would have heard him.

Q. Suppose he couldn't have halloaed louder than some of the engines would have been whistling, would you have been able to have heard him?

A. No, sir; if an engine would be whistling louder than he could halloo of course not.

Q. As a matter of fact you know that an engine can whistle louder than he could halloo, don't you?

A. Yes, sir.

Q. Now I will ask you this question: Isn't this rule No. 12 in this book of rules that has been put in evidence, which indicates that a signal swung across the track, lamp at night or hand by day, means to stop, and that a signal raised and lowered vertically means to proceed? Aren't those the signals by which you operate trains?

A. Yes.

Q. Or do you operate trains by hallooing?

269 A. In lots of cases they will halloo at you.

Q. In lots of cases they will halloo at you?

A. Yes, sir.

Q. Were you operating that train that night on hallooing signals or lamp signals?

A. I was operating on either. If I had heard a man hallooing I would stop.

Q. That was the only way he could stop you that night?

A. No, sir.

Q. But he never did stop you until he halloosed, did he?

A. No, sir.

Q. If he had waved his lamp across the track a dozen times you wouldn't have stopped, because you didn't see him, would you?

A. According to the position he had whether I would have seen him or not.

Q. You didn't see him at all?

A. No, sir.

Q. Then his waving across the track wouldn't have stopped you, would it?

Defendant company, by its counsel, objects to question because calling for a mere supposition.

Objection sustained.

Q. You told us on yesterday that this poor fellow Earnest, when you pulled him out from under the train, with one leg mashed off and the heel of the other one lacerated, that he said to you what?

270 A. What did he say to me?

Q. Yes.

A. When I first went to him after he was run over?

Q. Yes.

A. First when I found him under the engine with the engine standing on his shoe heel with his leg run over, the first thing that I said to him was that the engine wasn't on the leg but was on the heel, and he told me that the other leg had been run over?

Q. Yes, was that all he told you.

A. At that time?

Q. Yes.

A. Yes, sir; that was about all he said before I backed the engine off his heel.

Q. Well now, didn't you tell us on yesterday that when you got down there and got him out from under the engine, backed the engine off from him and got him out, that he said to you that he was walking along there—

A. Yes, sir.

Q. —Looking for his brother?

A. Yes, sir.

Q. And that he didn't censure you for the injury?

A. That he didn't censure me for the accident.

Q. That he was walking along there looking at his brother?

A. Looking for his brother.

Q. Do you know what balking means?

271 A. I don't know that I could give the right definition particularly.

Q. His honor says you may answer what you understood Earnest to mean about balking along there?

A. The way I understood it he was just balking along there and wasn't paying any attention to my engine at all.

Q. You were not paying any attention to him at all, were you?

A. Yes, sir.

Q. And you hadn't seen him for 400 yards?

A. Yes, sir; I had.

Q. I mean for 400 feet.

A. I was looking ahead.

Q. Looking ahead and hadn't seen him for 400 feet?

A. Yes, sir.

Q. I believe you told us when you got him down to the station that he made this statement again, and said he didn't censure you?

A. Yes, sir; I heard him say it several different times.

Q. You heard him make the same statement several different times.

A. Yes, sir.

Q. Well now, at the time he made it first there was no one present but you and Earnest, was there?

A. That was all, just me and Earnest.

Q. The next time he made this statement about balking along there and not censuring you—

272 Mr. SMITH: In order that counsel may not misquote the witness I wish to say that he has not testified that the plaintiff used the term balking more than once.

Q. Will you tell us what he said the next time he talked to you after getting him out from under the engine?

A. No, sir; at the time the doctors was working on him up at the office, he said there he didn't censure me with the accident, before several different people. There was lots of them in the office at the time.

Q. Did he use the word censure?

A. Yes, sir! I think he used the word censure.

Q. Well, will you tell us what you understood him to mean by the word?

A. Well, I understood him to mean by the word censure that he didn't blame me with his accident at all.

Q. He didn't use the word "blame" but used the word censure?

A. The word censure, yes, sir, I think that was the word he used.

Q. Did he say anything about balking along up there at the station?

A. No, sir.

Q. Did he say anything about looking for his brother up there at the station?

A. I don't remember but think he did.

Q. When you got him out from under the engine he was in pretty bad shape, wasn't he?



273

A. Yes, sir.

Q. He was terribly scared, wasn't he?

A. Well, I guess he was.

Q. He thought he was going to die, didn't he?

A. He said something about dying, yes sir.

Q. You thought he was going to die, too, didn't you?

A. No, sir; I didn't know whether he would die or not.

Q. I will ask you this, whether or not you were scared?

A. Yes, sir; I was scared.

Q. Weren't you afraid you had killed him?

A. Afraid I had killed him?

Q. Yes.

A. No, sir.

Q. Weren't you afraid your engine had killed him?

A. Yes, sir.

Q. Didn't you then begin talking to him, saying you were sorry it had happened, and then didn't he begin saying to you "John, don't blame yourself, maybe I was at fault." And didn't he want you to take him to the hospital and save his life if you could. Didn't he talk to you that way?

A. No, sir; he never said anything like that.

Q. What?

A. No, sir.

Q. Didn't he ask you to go to the hospital?

274

A. Yes, sir.

Q. And save his life if you could.

A. He begged me to go to the hospital with him.

Q. Wasn't he talking of dying?

A. Yes, sir; he said something about dying several different times, — think he did.

Q. Didn't he beg you to get his brother to quit working on the road for fear his brother would be killed?

A. Yes, sir; he begged me to get his brother to quit.

Q. Why didn't you give us that on yesterday when you gave us the bare statement that he was balking along looking for his brother? Why didn't you tell us all this then?

Mr. SMITH: In order that counsel for plaintiff may not mislead the jury I wish to say that witness did tell us this in chief yesterday.

Mr. MOORE: That is not my recollection, and the record will speak for itself. He told us some of it and didn't tell us what he is telling us today.

Mr. SMITH: We contend that he did, and are content to let the record speak for itself.

Q. Do you know whether he was conscious at the times he was talking to you, knew what he was talking about?

A. Yes, sir; he seemed to be conscious all right and knew everything he was talking about.

Q. Do you know whether he was scared so badly that he had no judgment so he might tell whether he was at fault?

275

A. Of course I couldn't tell any thing about that I shouldn't think.

Q. When you drew him out you dragged him back on the ground and laid him down on the track?

A. Between the tracks, yes sir.

Q. And he was laying there with one heel lacerated and one leg cut off, wasn't that the way of it?

A. Yes, sir.

Q. One leg was ground into jelly from his knee down to about his ankle?

A. No, sir.

Q. The wheels of the engine had passed over it, hadn't they?

A. The pony wheel of the engine had passed over one leg, yes sir.

Q. Well those pony wheels with the weight that they support are very heavy, aren't they?

A. Yes, sir, pretty good weight.

Q. Your engine weighs 100,000 pounds or more, doesn't it?

A. I don't know the exact weight of it.

Q. Anyhow those pony wheels helped support the weight of that engine?

A. Yes, sir.

Q. And you got him out there in that condition, laid him down on the ground and he gave you this statement?

A. Yes, sir.

276 Q. Now, how soon after you got him out was it that he gave you this statement?

A. How soon after I got him out from under what?

Q. Out from under the engine.

A. Just as soon as I backed the engine off he made this statement.

Q. What were his words about his going to die, can you remember them?

A. Sir?

Q. What were his words when he told you he was afraid he was going to die?

A. No, sir; I can't remember exactly his words, the words he used when he was speaking of dying.

Q. Well, what were his words when he was talking to you about getting his brother to quit firing?

A. What were his words?

Q. Yes.

A. He asked me to beg his brother to quit firing.

Q. Was that all he said in that connection?

A. No, sir; as well as I remember he said if he died before he seen his brother to beg him to quit also.

Q. Well, you don't know where his brother then was, do you?

A. No, sir.

Q. He didn't know where his brother was?

A. I don't know.

Q. But you didn't know, did you?

A. No, sir.

277 Q. And he was begging you then to get his brother to quit firing if he died before he saw his brother?

A. Yes, sir.

- Q. Well, he was in a terrible mental condition, wasn't he?
- A. With which?
- Q. He was in a very bad mental condition, wasn't he?
- A. Yes, sir.
- Q. He was awfully excited, wasn't he?
- A. Yes, sir; seemed to be somewhat excited.
- Q. Do you know whether his voice was trembling?
- A. No, sir; I can't say it was.
- Q. Do you know whether he was crying from the pain?
- A. No, sir; I never seen him cry.
- Q. You didn't see him cry?
- A. No, sir.
- Q. When you were talking to him then was this other train running by?
- A. No, sir; that train had done gone by.
- Q. Was there any noise there about the yard?
- A. No, sir; we were above the engines.
- Q. Do you think that you yourself were excited to such an extent that you could or could not remember exactly what he said?
- A. Why, I could remember exactly what he said when I got him out from under the engine.
- Q. You remember exactly what he said?
- 278 A. Yes, sir.
- Q. Well, can you tell us you don't remember his words when he was talking to you about his brother?
- A. Don't remember his words?
- Q. Yes.
- A. I don't understand exactly what you are driving at.
- Q. Now you tell us you remember exactly what he said. Didn't you tell us awhile ago that you didn't remember exactly what he said about his brother?
- A. About his brother?
- Q. Yes.
- A. Yes, sir.
- Q. You don't remember exactly what his words were?
- A. I don't remember his exact words, no sir.
- Q. Couldn't you be mistaken about his using the word "brother" at all?
- A. No, sir.
- Q. Couldn't you be mistaken about his using the word "censure?"
- A. No, sir.
- Q. Couldn't you be mistaken about his using the word "balk" at all?
- A. No, sir; he certainly said "balking along."
- Q. Mr. Drawbond, if it wasn't necessary for your fireman to go from switch No. 3 on down to the main line and line up the switches, switch No. 2 and switch No. 1, why didn't you take him on your engine at switch No. 3 and carry him on through up to the main line?
- 279 A. I never said it wasn't necessary for him to line the switches.

Q. If the switches then, some of them, were against you he would have to line them up, wouldn't he?

A. Yes, sir; he would have to line them up.

Q. Suppose he had found any obstruction on the track between No. 3 and No. 2, something that would have derailed your engine, what would it have been his duty to do?

A. It would have been his duty to stop me.

Q. Well, if you didn't see him until he got to switch No. 2 how would he have stopped you?

A. He would have given me a signal.

Q. How would he have given you a signal so you would have seen it?

A. How would I have seen it?

Q. Yes.

A. Well, really I couldn't have seen the signal if he had given me a signal with the cylinder cocks open like they were. That is according to the distance, if he was far enough ahead of me I might have seen it or might not have seen it.

Q. You told us yesterday that your one trouble you had was that the cylinder cocks were open and steam blew out on either side of the track and struck against the rails and glanced up?

A. Yes, sir.

280 Q. About how many feet out away from the engine was that steam escaping from the cylinder cocks striking the ground and rail?

A. How many feet from which?

Q. How many feet from your engine was that steam striking the ground and the rails and then glancing up?

A. I don't understand you. Do you mean, how far would the steam from the cylinders go, how many feet, and hit the ground?

Q. Yes.

A. Something like two or three feet.

Q. Then there was another track whose rails were within two or three feet of your track?

A. Sir?

Q. There were other rails within two or three feet of your track?

A. Yes, sir.

Q. Don't you know that those tracks are several feet apart and not two or three feet apart?

A. I don't understand exactly what you ask me.

Q. You don't. But you do tell us that steam was escaping from your engine on either side and blowing out against the ground and rails on the other track and then glancing up?

A. Yes, sir.

Q. Well now, when it blew out there didn't it glance up and pass up by the side of your engine?

281 A. Pass up in front of the engine, yes, sir.

Q. And you were in the cab?

A. Yes, sir.

Q. And looking out through the window?

A. Yes, sir.

Q. When this steam was blowing out on either side and glancing up on either side how did that obstruct your view directly in front?

A. Because the steam rose in front.

Q. The steam rose in front?

A. It rose in front of me.

Q. In front of you?

A. Yes, sir.

Q. Wouldn't steam rise out here on either side and some distance from your engine?

A. Yes, sir; and rise right in front of the engine.

Q. Right in front of it?

A. Yes, sir.

Q. Very well then. The cylinder cocks are on the sides of the engine?

A. They are under the cylinders of the engine.

Q. And on both sides of it?

A. Yes, sir.

Q. When the steam escapes it goes out I will say on a level from the engine, doesn't it?

A. I don't know as it would go exactly on a level.

282 Q. And doesn't it blow out some ten or fifteen feet sometimes from the engine?

A. Why, it would hit the ground in two or three feet and would go fifteen feet as far as that is concerned. Where it would hit the ground would be something like two or three feet.

Q. Suppose you wanted to stop that steam from escaping, how do you do that?

A. Close the cylinder cocks.

Q. How long does it take?

A. But a very short while.

Q. That quick (snapping thumb and forefinger) can't you?

A. Very quickly.

Q. You can close it in an instant?

A. Yes, sir.

Q. If you wanted to see your track and the steam was escaping what would you do?

A. If I wanted to do what?

Q. If you wanted to see your track and steam was escaping what would you do?

A. I would stop the engine.

Q. Stop the engine?

A. Or close the cocks if the cylinders wasn't in danger.

Q. You would do either one or the other. If you were passing a place where you were likely to get signals and it should happen steam was bothering you what would you do? Leave the cylinders open or close them?

283 A. Why, if the cylinders were full of water you would have no right to close them, you would endanger the head of the cylinders.

Q. Suppose then you were passing a place where you might get a signal, with your cylinder cocks open, and you were drawing a

train, would you close the cylinder cocks to look for signal or leave the cylinder cocks open and drive right ahead?

A. Where I was expecting a signal?

Q. Yes.

Defendant company, by its attorneys, objects to the question because calling for a mere supposition.

Objection overruled.

Defendant excepts.

A. Why, you would have to shut the engine off or close the cylinder cocks.

Q. And you explained to us awhile ago that some of these switches might be against you?

A. Yes, sir; some of them might be against us.

Q. Then if you had closed the cylinder cocks or let your engine drive on drifting with no steam on for a few feet how would that have done, given you a perfect view of the track, wouldn't it?

A. No, sir.

Q. You wouldn't?

A. Not in a few feet you wouldn't.

284 Q. Wouldn't you have passed by the steam in twenty feet?

A. In twenty feet?

Q. Yes.

A. In something like that I guess.

Q. Then if you had let your engine drift twenty feet with the cylinder cocks closed there would have been no steam in the way, would there?

A. I couldn't say that there would be in twenty feet.

Q. And there would have been no danger then either would there?

A. Been no danger?

Q. Been no danger of your view being obstructed by steam?

A. No, sir; that wouldn't obstruct my view.

Q. And if you had drifted your engine 20 feet to get out of the steam there would have been no danger of the cylinder heads being blown out either, would there?

A. No, sir.

Q. I thought not. Were you not looking at that freight train running by there yourself?

A. No, sir.

Q. Well, do you remember the train did run by there?

A. Yes, sir.

Q. Did you see it?

A. Yes, sir.

Q. Where were you when you saw it?

285 A. When I seen the train?

Q. Yes.

A. The train was going by when we started.

Q. When was the next time you saw the train?

A. The next time I seen it?

Q. Yes.

A. I don't remember seeing it any more.

Q. You were running right along by the side of it, weren't you?

A. No, sir.

Q. Weren't you running right along by the side of that train until it went by, only three tracks between you and it?

A. Three tracks between me and it?

Mr. SMITH: Weren't there four tracks there?

WITNESS: Three—Well, counting the westbound main line there were four tracks.

Q. Three tracks between the track you were on and the track the other train was on?

A. Four tracks.

Q. And you ran 400 feet before you ran over the man, and you say you didn't see that train while you were running that four hundred feet?

A. I don't know as I paid any particular attention to the train. I couldn't say that I did. There were cars in there on some of those tracks.

Q. Well, if you didn't see Mr. Earnest and didn't see  
286 the train you were going out to pull what did you see that night?

A. What did I see?

Q. Yes.

A. I don't know what all I seen.

Q. Sir.

A. I couldn't say what all I seen, as far as that is concerned.

Q. You told us yesterday you couldn't see but 75 or 80 feet ahead of your engine that night?

Mr. WINGFIELD: Inasmuch as counsel is misquoting the witness I must interrupt to say that he did not so testify on yesterday.

Q. What did you say about that on yesterday?

A. About what, Mr. Moore.

Q. Now, you have asked me what I say you said on yesterday. Didn't you say on yesterday that the best reflection of the headlight would be 75 or 80 feet?

A. Of the headlight?

Q. Yes.

A. Yes, sir.

Q. And you said you could see a big object that distance, 75 or 80 feet?

Mr. WINGFIELD: I must again interrupt on account of counsel misquoting the witness. Witness testified on yesterday that he could see a big object farther than that.

Q. I believe you said you could see a big object as far as  
287 150 feet?

A. Yes, sir; I think so.

Q. How far could you see his torch?

A. I couldn't tell you the exact distance I could see the torch. A light may be seen a long distance.

Q. Couldn't you see the torch half a mile?

A. I don't know.



Q. Sir?

A. I couldn't say I could.

Q. You couldn't see a torch half a mile at night. Wasn't it a good torch that he had?

A. I don't know anything about the torch, as far as that is concerned. It was an ordinary torch I suppose.

Q. It was burning with a great big flame six or eight inches long, wasn't it?

A. I couldn't say it was six or eight inches, no sir.

Q. Describe that torch to the jury. They are not railroad men.

A. Well, the torch he had was made in funnel fashion, and had a wick in it something like as big as your thumb. In knocking the torch up you could knock the wick out that far and farther than that.

Q. You could knock the wick out bigger?

A. The farther you knock the wick out the bigger the light would have been.

Q. Wouldn't it make the flame, if you knocked the wick out, five or six inches long?

288 A. If you had a wick five or six inches long and you knocked the wick out that long you would have fire that long.

Q. You didn't have a flame any longer than the wick that was exposed?

A. Sir?

Q. The flame is no longer than the wick that is exposed?

A. Why certainly the flame would be longer than the wick.

Q. Well, can you tell us how long the flame was standing up there from that torch?

Mr. SMITH: It seems to me that this cross-examination is taking rather a wide latitude and consuming the time of court and counsel. Does your honor think this material?

The COURT: Yes, the jury does not know about torches and the witness does know. He may give how much flame was on plaintiff's torch the night of the injury.

WITNESS: No, sir; I couldn't say exactly how high the torch would burn.

The COURT: Can't you give us any idea.

WITNESS: He had a good light when he left me.

Q. Mr. Drawbond, didn't you walk with Dave Earnest up to that engine that night yourself when he was returning from getting the shovel?

A. I don't remember walking up there with him. He was on the engine when I came there. I made two trips to the registering office.

289 Q. Do you remember what time you registered at the office?

A. Eleven o'clock.

Q. Have you that register with you?

A. No, sir.

Q. Have you been back to see the register since?

A. No, sir.

Q. Do you know whether the register has been brought here to Roanoke or not?

A. I do not.

Q. Did you register the correct time?

A. I certainly did.

Q. You registered the correct time?

A. Yes, sir.

Q. Well, suppose you had been two minutes after eleven, having been called to go out at eleven o'clock, would you have registered it as eleven?

A. If they had called me late, do you mean?

Q. Read the question, Mr. Stenographer. (Which is done.)

A. Well, two minutes that way I don't know but what I would have registered as eleven o'clock. Sometimes they call you a little late and you have a right to register and there wouldn't anything have been said about two minutes.

Q. There wouldn't have been anything said about two  
290 minutes. Did they call you late that night or not?

A. Called me on time.

Q. Don't you remember that you registered that night after eleven o'clock?

A. Registered after eleven?

Q. Yes.

A. I registered at eleven o'clock.

Q. Exactly?

A. Yes, sir.

Q. Then you went straight to your engine?

A. Yes, sir.

Q. And you found Mr. Earnest there?

A. Yes, sir; Mr. Earnest was on the engine when I got there.

Q. You walked two hundred feet after you registered and reached the engine?

A. Yes, sir.

Q. Then did you go back to the oil house any more?

A. Yes, sir.

Q. How long did you stay at the oil house the next time you went back?

A. I don't remember how long. I walked down to the phone and called them up.

Q. Called up who?

A. The yardmaster.

Q. What did you call up the yardmaster for?

A. For instructions.

291 Q. And how long did you stay down there that time?

A. I don't know exactly how long. I walked right down to the phone and right back.

Q. Well then, you got back to your engine and what did you do?

A. When I got back to the engine what did I do?

Q. Yes.

A. I told Dave what instructions we had.

Q. You told Dave what instructions you had?

A. Yes, sir.

Q. That was to push 82 over the hill, was it?

A. Yes, sir.

Q. What did you do after you told Dave about your instructions?

A. What did I do?

Q. Yes.

A. We were both standing down in the pit then.

Q. 82 was due say at fifteen minutes after eleven, wasn't it?

A. I don't know exactly at what time 82 was due.

Q. At what time were you due to leave that point where your engine was standing?

A. What time was I due to leave?

Q. Yes, the point where your engine was standing?

A. About 11:15.

Q. Well, did you leave at 11:15?

A. Near about 11:15.

292 Q. Tell us what you mean by "near about"?

A. Something close to it.

Q. How many minutes after eleven-fifteen?

A. I couldn't say a minute after that time. It might have been we left a minute before or a minute after. I don't have to get to the second or minute.

Q. Didn't you leave there a considerable time after 11:15, and didn't leave until your train was running by that you were to push, a train running twenty miles an hour?

A. I don't know how many miles an hour the train was running.

Q. You ran over Mr. Earnest at 11:18?

A. Somewhere along there. I don't know the exact second.

Q. If you had left at 11:15 you were three minutes running four hundred feet. Now you know that you were not that long running four hundred feet?

A. Three minutes?

Q. Yes.

A. No, sir; I shouldn't think I would have been that long running it.

Q. So then you left that place late, didn't you?

A. I would say that I couldn't say I left there a minute late. I won't say the exact time but it was just about 11:15, somewhere close to 11:15.

Q. Well, No. 82 was running by when you started from  
293 the coal wharf?

A. Yes, sir; No. 82's engine was coming along about the wharf then.

Q. No. 82 didn't make any stop, did it?

A. No, sir.

Q. You were supposed to go down by switches 3, 2 and 1, and then on out by the side line to the main line, clear up to the station, and run in and get in behind No. 82 without No. 82 stopping and push it over the hill. Wasn't that your duty?

A. Why, sometimes they would send us to Morgan. We probably wouldn't have caught that man until he got to Morgan, and he would have been standing still at Morgan, three miles from there.

Q. Anyhow you were to run in behind that train without its stopping and couple up to it while you were both running? Wasn't that right?

A. Yes, sir; they couple them up. The pusher engine follows on behind and couples it.

Q. Wasn't it your business to catch it as soon as you could after you got on the main line?

A. It was my business to catch it as soon as I could according to the tonnage he had. If he had a heavy train or anything like that it was according to the speed he was making.

Q. Wasn't it your business to catch it as soon as you could after you got on the main line?

294 A. As soon as I could?

Q. Yes.

A. I don't know as it was my business to catch it as soon as I could.

Q. How fast was No. 82 running that night?

A. I couldn't say.

Q. Wasn't it running twenty miles an hour that night?

A. I couldn't say what No. 82 was making.

Q. You do tell us you might have been a little bit late in leaving the coal wharf and that No. 82 was running by when you left the coal wharf?

A. Yes, sir.

Q. If you were a little bit late why were you late?

A. Why was I late?

Q. Yes.

A. I don't mean to say that I was late. I say I might have been something like a minute late, and I might have been started away from there just a little bit ahead of time, and not exactly right to the second, that ain't necessary.

Q. Were you anxious, or was it your duty to get in behind that train as soon as you could after you saw it going by you and you standing still out there on No. 3?

A. Was I anxious?

Q. Yes.

A. I don't understand you.

295 Q. With reference to these cylinder cocks: An engine stands on the yard with the cylinder cocks open and drained before you start out, doesn't it?

A. No, sir; you can't drain cylinder cocks if they stand open. It will not drain the cylinders altogether.

Q. Very well, it will drain?

A. To some extent it will, yes sir.

Q. It will drain enough until the heads wouldn't be knocked out?

A. No, sir; lots of heads are knocked out that way.

Q. Were you looking for a signal at No. 3?

A. At No. 3?

Q. Yes.

A. Yes, sir.

Q. Wasn't No. 3 just as likely to be in proper position for you to go out as was No. 2?

A. No, sir.

Q. Well, will you explain why No. 3 wasn't just as likely to be in proper position as No. 2?

A. Well, the switches as I told you awhile ago was most always lined to the lead. The pusher engine might have backed in on some of them tracks and left the switch wrong. On the siding we were standing on, we was on No. 3, it would have been thrown for the lead to let me on the lead.

Q. Then if somebody had gone in on No. 2 No. 2 would have had to have been thrown for the lead too?

A. If the pusher engine went in. Train crews always set them for the lead.

296 Q. No. 2 wasn't set for the lead too was it?

A. Yes, sir; it was set for the lead.

Q. It was set for the lead after Mr. Earnest set it?

A. No, sir; Mr. Earnest set it against the lead.

Q. My question was wrong. No. 3 was against you, wasn't it?

A. Yes, sir.

Q. Then if somebody had gone in on No. 2 that would have been against you to, wouldn't it?

A. Probably it would and probably it wouldn't.

Q. I believe you said on yesterday that Mr. Earnest had gotten ready to go when you got there?

A. No, sir; I didn't.

Q. What did you say about that?

A. I said Mr. Earnest and me got the engine ready.

Q. Was your engine displaying markers?

A. Yes, sir.

Q. So under your rule your engine was a train, was it?

A. Yes, sir.

Q. And this accident was within the yard limits at North Fork, was it?

A. Yes, sir.

Q. We are through with the witness, gentlemen.

Re-examination.

By Judge JACKSON:

297 Q. Mr. Drawbond, I want to ask you just a few questions. I will ask you to state in the first place whether there was any written rule covering this service in the North Fork yard.

The plaintiff, by his attorneys, objects to the question because the rules contained in the defendant railway company's book of rules have been introduced and speak for themselves.

The COURT: That might be as to the construction the railway company and its employes put upon the rules already introduced. Ask the witness if the rules introduced cover it.

Q. Do you know of any written rule covering pusher service in the North Fork yard?

A. It is operated under yard rules.

Q. Are the yard rules written rules?

A. Why, you obey—It isn't necessary to get written rules from the yardmaster. Is that what you have reference to?

Q. You say it isn't governed by any written rule but by the rules of the yard?

A. By the yardmaster, yes sir.

Q. Are they in writing, the rules of the yard?

A. There is a rule in the book of rules governing it, the yard rules.

Q. What rule are you referring to?

A. The yard rules?

Q. Yes.

A. I say there is a rule in the book of rules governing the  
298 yard rules.

Q. What is that rule that you refer to?

A. Well, it says in there that engines working in yards—

The plaintiff, by his attorneys, objects to witness attempting to state a rule if it is written.

Q. Show it to us.

A. Yardmasters—

Mr. MOORE: Have you the rule?

WITNESS: There is no rule for the operation of yards, except a rule in there that mentions yard engines.

Q. Well, that isn't what I was asking you, but as to whether there was any rule in regard to operating pusher service in the yard?

A. No, sir.

Q. There was none?

A. No, sir.

Q. I will ask you to state again what the practice was in regard to giving and receiving signals; whether it was necessary for the engineer to receive a signal at these intermediate switches before proceeding?

A. No, sir.

Q. During the time that the plaintiff Earnest was your fireman in that yard I will ask you whether or not any such practice as that prevailed?

A. No, sir.

Q. How did he proceed?

299 A. Why, he always got—whenever we got the engine ready we always said so and he set the switches and went up to the main track. And after we got instructions over the telephone he opened the main switch and went on out.

Q. I am speaking about on the yard.

A. Yes, sir.

Q. I will ask you whether or not that is the custom and usage with reference to yard firemen, or I mean all of the firemen who ever operated with you on that yard?

A. Yes, sir.

The plaintiff, by his attorneys, objects to question and answer and says the defendant railway company has no right as a defense to prove violation of its own rules in order to excuse itself.

The defendant company, by its attorneys, replies by denying that it did in fact do any such thing or that it is now attempting to prove such a thing.

The COURT: The printed rules introduced require engineers to use due care and caution. Now as to whether or not this engineer did use due care and caution is a question for the jury on the evidence in the case, and the practice followed in that yard would be proper evidence to go before the jury to determine that question. I do not recall any printed rule contained in the defendant railway company's book of rules that goes into such detail, that after a switch was set and ready the fireman must wave the engineer forward, or that it was the duty of the engineer to stop until he got signal to go ahead. Now, as to whether or not it was the engineer's duty to stop for signal before proceeding over the switch is the very structure of this case; therefore the practice of engineers and firemen there on that yard is admissible evidence.

300 Judge JACKSON, continuing re-examination:

Q. Now you have stated what is the usage and custom there. I will ask you to state whether or not the plaintiff in this case, Mr. D. E. Earnest, was perfectly familiar with the method of moving engines out of that yard?

A. Yes, sir.

Q. Something has been said about your not seeing him for a certain distance, and about draining your cylinder cocks and not being able to see him until after he was struck on the yard. I will ask you whether under the custom and usage as you have stated of doing the work there you had any reason whatever to anticipate that Mr. Earnest was going to be in a position of danger in front of your engine on that track; and if so state what those reasons if any, were.

The plaintiff, by his attorneys, objects to the question because leading.

Objection sustained.

Defendant objects.

Q. State what danger, if any, you had reason to apprehend there was to Earnest as your fireman under the usage and custom of doing that business on the track there?

A. I didn't think there was any danger whatever.

Q. You say it was no danger whatever that he was in?

A. No, sir.

Q. You have stated that the custom was for him to go ahead and line up the switches?

A. Yes, sir.

301 Q. How long does it take,—what length of time did it take for him to go ahead and do that work?

A. Why, he couldn't have need to have stopped. A man can line up switches as fast as he can walk. All he has to do is to reach down and turn the lever.

Q. You say that is so where it is necessary for him to use the



lever. As a general thing is it or not necessary for him to use the lever at all in order to put the switch right?

A. I don't understand the question exactly.

Q. Well, you have stated that if the switch wasn't properly set it would be necessary for him to set it, and that he would do that by taking hold of the lever and just turning it?

A. Yes, sir.

Q. Now if the switch is already properly set is it necessary for him to take hold of the lever at all?

A. No, sir; it is not necessary for him to take hold of the lever at all.

Q. You say it is not necessary?

A. It isn't necessary to take hold of the lever at all.

Q. Are those switches generally set properly for an engine to pass out, are they or not?

Plaintiff, by his attorneys, objects to question as leading.

Q. How are those switches generally set?

302 A. To the lead.

Q. Was your train on the lead after it passed No. 3 switch?

A. Yes, sir.

Q. Some question was asked you by Mr. Moore in reference to the switch being out of use, or there being obstructions on the track, and the necessity for signals in that kind of case. Is it the duty of any one to keep the track and switches in order there in that yard, and if so state to the jury whose duty it is?

A. It is the section foreman's. Any switch out of order must be reported at once. Any employé who finds a switch out of order must report it.

Q. Now, supposing, as he did, that the switch is out of order, could Earnest tell that from the lever?

A. Yes, sir.

Q. How would that indicate it?

A. The position of the lever.

Q. The position of the lever?

A. Yes, sir.

Q. If it is out of order in what position would the lever be in?

A. If it was out of order?

Q. Yes.

A. Well, it is according to which way it is set.

303 Q. Well, if it was out of order and it was necessary because it was out of order for him to give you a signal, I will ask you to state to the court and jury whether that would place him in any situation of danger with reference to your engine, and if so how would it do it?

The plaintiff, by his attorneys, objects to question because leading, and calling for an opinion.

The COURT: Objection is sustained. Let the witness describe what would have been done there according to usage and practice.

Defendant excepts.

Q. If Earnest had discovered the switch was out of order what do you say he would do?

A. He would have waved me down and stopped me.

Q. In what position would he be when he was waving you down under those circumstances?

A. In what position?

Q. Would he be facing you or with his back to you or how?

A. He should be facing me.

Q. Do you know anything about whether there was any light on that yard?

A. Yes, sir; there was light on the yard.

Q. What kind of lights?

A. Electric lights close to the place where he was hurt.

Q. Do you know what kind of electric light it was, what candle power?

A. No, sir; I don't know what power.

Q. What was the condition of that yard there as to lights in the neighborhood of this switch?

304 A. There was several electric lights right ahead of the switch. There was one arc light there about even with the main line, and one about the saloon; an electric light pretty close to where he was hurt.

Q. Mr. Moore has asked you some questions about the condition of Mr. Earnest. I will ask you to state whether or not at the time this accident happened and at the time he was talking to you he appeared to be in his right mind?

The plaintiff, by his attorneys, objects to the question because leading.

Objection sustained.

Defendant excepts.

Q. You say that Mr. Earnest was suffering, of course?

A. Yes, sir.

Q. And that he appeared to be frightened to some extent?

A. Yes, sir.

Q. Well, was there anything in his conversation there that tended to show that he was irrational, or that he did not know what he was talking about? If so, state what it was, if there was anything.

A. No, sir; I had no reason to think but what he was in his right mind.

Q. What question was it that you asked Mr. Earnest before he used the language that you say he used, that he didn't censure you? What did you ask him?

A. I said "My God, Dave, what was the matter with you?"

305 Q. And then he told you what you have stated?

A. Yes, sir.

Q. Some questions have been asked you about why you didn't shut off your cylinder cocks and let your train drift. What was the condition there, that is, was it level or slightly up grade or how?

A. Upgrade.

Q. Well, were the conditions such that you could have let your engine drift?

A. No, sir; you couldn't drift the engine to amount to anything.

Q. What kind of train was this one that was passing and that you were to couple your engine to when you got out of the yard?

A. What kind of train?

Q. Yes.

A. A time freight.

Q. Was it a heavy train or a light train?

A. It was a heavy train.

Q. Well, about that, after you cleared this yard would you or not make better time with your engine?

A. Oh yes.

Q. Would you go faster or slower than the heavily loaded freight, after you got out with your engine?

A. I would have made better time.

Q. You would have made better time?

A. Yes, sir.

306 Q. When were you to couple up to that train, the freight?

A. When I overtaken it.

Q. Was it necessary for you to overtake it at any particular point?

A. No, sir.

Q. Mr. Moore has asked you about the duty that would confront you when you were draining the cylinders on the main line or at any other place than on the yard, or pulling a train, where there was an accumulation of steam in the cylinders. When is there such an accumulation of steam in the cylinders as you spoke of?

A. When an engine has been standing.

Q. When it has been standing. Would there be any accumulation of this steam in the cylinders when the engine was in the service, running?

A. No, sir.

Q. That is all.

Recross-examination.

By Mr. MOORE:

Q. You told Judge Jackson awhile ago in speaking of these rules that there was a rule in the book that prescribed what the other rules should be with reference to the movement of trains in yards, and you got the rule and started to read it to Judge Jackson but didn't do so. Will you please read that rule?

307 A. He asked me if there was any rule in there for the yard.

Q. What did you tell him?

A. I told him there was.

Q. Where is the rule?

A. There is a rule in there that speaks of yard engines and yard-masters.

Q. Will you please point out that rule to us?

Judge JACKSON: Witness said there was no rule in the book about engines in pusher service in yards.

A. There is a rule in there that says how yard engines shall work. I don't know exactly where it is. It tells how the difference is between a yard engine and a main line engine.

Q. You say you don't know where that rule is?

A. No, sir; not in the book of rules, I don't know exactly the rule.

Q. You have the book of rules in your hand. Examine it and see. Have you not the book of rules?

A. Yes, sir.

Q. Are you familiar with the book of rules?

A. Yes, sir.

Q. Are you familiar with it?

A. Yes, sir.

Q. Then if you are familiar with it you can find it of course.

A. Yes, sir; I can find it. (Looks.)

308 Q. You have been looking for that rule for some time and haven't been able to find it. May I suggest to you where you might find it?

A. Sir?

Mr. WINGFIELD: Give the witness a chance to find it.

Q. Your counsel objects to my suggesting to you where it is—

Judge JACKSON: No we don't object, but we have suggested that you give the witness an opportunity to find it. There are a sight of rules in this printed book and although generally familiar with them one cannot turn to a rule on a certain subject always in a minute.

The COURT: In the interest of economizing time I suggest that counsel say what rule he has in mind.

Q. Now, his honor suggests that I do point out the rule you may have in mind, in order to save time. I refer to rule 522, page 60, under the subject of yardmasters, and will ask you if that rule is the one that you are talking about.

A. Yes, sir; that is one of the rules.

Q. Well now, is that one of the rules you were referring to in answering Judge Jackson awhile ago?

A. I don't remember exactly the question.

Q. You told Judge Jackson awhile ago that there was a special rule in the book that referred to the other rules that governed the movement of cars and trains in yards. Is this rule 522 the  
309 rule, or one of the rules, you had in mind when you were answering Judge Jackson?

A. The rule I had reference to, and I don't know the number of the rule, but it is as to yard engines—it is the difference how a yard engine is fixed and another engine. A yard engine should display a headlight in front and one on the rear.

Q. Well then I will refer you to that one directly. You have told us that this rule 522 is one of the rules you had in mind, did you?

Mr. SMITH: I don't understand that he told you that is one of the rules.

Q. Then you told us awhile ago that rule 522 was one of the rules you had in mind. Is that right?

A. No, sir.

Q. Well then, has rule 522, under the subject yardmasters, anything to do with the movement of engines and cars through yards?

A. Has it anything to do with it?

O. Yes.

A. I don't know that it has.

Q. But you did tell us that yardmasters had control of movement of trains and cars in yards, did you not?

A. Yes, sir; yardmasters.

Q. Then you told us that that engine you were on was under his control?

A. Yes, sir.

Q. Well now, read rule 522 and let us see whether that 310 has reference to movement of your engine or not?

A. I have no book.

Q. I will read it.

"522. They must be familiar with the rules of the freight service, and the duties of employes connected with train service, and require an efficient discharge of those duties in their yards."

Did that rule have anything to do with the movement of your engine?

A. Did it have anything?

Q. Yes.

A. I couldn't say that it did.

Q. You don't say that it did?

A. No, sir.

Q. You haven't been able to find this rule you were talking about, have you?

A. What rule are you talking about?

Q. The one you are talking about.

A. I don't understand what you are driving at?

Q. You told us awhile ago that there was some rule that governed the movement of trains in yards, and then afterwards said that that rule had some reference to lights or certain kinds of lights on engines. Have you been able to find that rule you were talking about?

Mr. SMITH: We object to the question because misquoting the witness, and also because witness has not had a book but a short part of the time, while Mr. Moore is endeavoring to leave the impression that he has had one and been looking for a rule all this time.

311 This witness has said there was no written rule governing engines in yards.

The COURT: I think Mr. Smith is right in so far as he says witness has testified there was no printed rule governing what he should do on the yard; and Mr. Moore is right in saying witness said there was a written rule about headlights on yard engines and Mr.

Moore has a right to elicit further evidence from this witness on that point.

Q. Will you tell us where that rule is governing lights on engines in yards?

A. No, sir; I don't remember the number of the rule.

Q. You have a book of rules there before you?

A. No, sir; I haven't.

Q. Where is it?

Mr. SMITH: You have it over there.

Mr. MOORE: I have the one I have had all the time. You have half a dozen over there.

Mr. SMITH: We deny that we have half a dozen over here, and while as an accommodation I have been letting witness have mine as Mr. Moore asked questions about the rules I now wish to follow the rules myself and Mr. Moore may hand witness his book.

Mr. MOORE: I will hand him the book I have.

Q. Now, having examined the book of rules where is the rule you refer to?

A. Rule 18.

Q. Will you read it to the jury, or I will do so:

312 "18. Yard engines will display the headlight to the front and rear by night. When not provided with headlight on rear two white lights must be displayed. Yard engines will not display markers.

Were you on a yard engine that night or on a pusher?

A. On a pusher.

Q. You were not on a yard engine?

A. No, sir.

Q. That is the rule you are talking about that governs the movement of your engine in the yard?

A. I didn't say it governed the movement of my engine. I understood Judge Jackson to ask me the question was there any rule in the book of rules governing the movement on yards concerning yard work.

Q. So you were in train service then, were you?

A. Yes, sir.

Q. How far was that electric arc light you referred to from where Mr. Earnest was hurt?

A. I don't know the exact distance. It was close though. I think it was something like within thirty yards of it.

Q. That would be 90 feet?

A. Or closer than that.

Q. The arc light you said was up at the main line switch?

A. The arc light?

Q. Yes.

A. Yes, sir; there was one arc light up near the main line switch.

313 Q. And that is the one you referred to as being 30 yards from it?

A. No, sir.

- Q. Where is that one then?  
A. Down below there, on the left side.  
Q. We are through with the witness.

Re-re-examination.

By Judge JACKSON:

- Q. I omitted one question: Was that switch at the point where Earnest was run over by your engine set right that night?  
A. Was it set right?  
Q. Yes.  
A. Yes, sir; it was right.  
Q. To the lead?  
A. Yes, sir.  
Q. That is all.

(And witness leaves the stand.)

314 DR. P. H. KELLY—for Defendant.

Examined in chief by Mr. SMITH:

- Q. What is your occupation?  
A. I am a physician.  
Q. Where do you live, Doctor?  
A. I live at Vivian, W. Va.  
Q. Were you at North Fork on the night of the 13th of February 1909 when Mr. Earnest was hurt?  
A. Yes, sir; I was. I was there when he was hurt, but can't say positively as to the date, but it was the night he was hurt.  
Q. When did you hear of his being hurt?  
A. Why, I had been attending Masonic lodge that night, and we came from the hall about—well it must have been something near eleven o'clock, something between ten and eleven and I don't remember the hour exactly. About the time I got to the telegraph office they brought Mr. Earnest in there injured. I don't suppose it had been more than fifteen minutes after he was injured, or twenty minutes, before I saw him. They carried him up there and it couldn't have been long.  
Q. State to the jury the nature of his injury—Did you attend him?

A. Yes, sir; I did.

315 Q. State to the jury the nature of his injury.

A. They carried him in the office, and I laid him on the table and made him as comfortable as I could, and dressed his leg. I found that his right leg was crushed off about six inches below the knee, and from that down. Then he had some other slight bruises that didn't amount to anything. And the heel of his left foot had been pinched a good deal, but only through the soft parts of it I afterwards found. I believe they were all the injuries there were on him.

Q. Did you see him have any injuries anywhere else?



A. No, sir; or I don't recall any. As I say he was probably bruised, and there may have been some little scratches about his body, but I don't recall that I saw any others at that time. I wouldn't say there was or was not. Those were the only things my attention was called to, and were the only things I dressed and that required attention, the injury to the leg and the heel.

Q. The right leg had been mashed and the left heel was——

A. Mashed.

Q. Mashed or injured to some extent?

A. Yes, sir.

Q. Doctor, was there any other doctor who assisted you about the matter?

A. Yes, sir; shortly after I began to fix him up Dr. Cook came in there. Then he assisted me, or rather we did the work together.

316 Q. You do work for the Norfolk & Western Railway, do you?

A. Yes, sir; I have been surgeon for them a good while.

Q. And live at Vivian?

A. Yes, sir.

Q. Where does Dr. Cook live?

A. He lives there at North Fork, near where the man was hurt.

Q. Well, what did you and Dr. Cook do for the man that night?

A. Why, we fixed up his leg as we term it by putting on an emergency dressing. That is, we washed the injured part off carefully and antiseptically, and stopped all hemorrhage, put the necessary dressing of gauze, absorbent cotton and bandages on injured parts, and made it entirely secure from any further hemorrhage, and made him as comfortable as we could under the circumstances.

Q. Then what was done with him?

A. Why, he was carried and put in a caboose and taken to the hospital at Bluefield.

Q. Do you remember the time he left North Fork?

A. Well, I don't remember exactly but suppose something like—I expect it was an hour after he was hurt, or possibly longer before he left North Fork. The reason for the delay—Shall I state that?

Q. Yes.

317 A. His brother, who was also a railroad man,—he wanted his brother to go with him to the hospital, and his brother was up the road, and we had to wait until his brother came back in order that he might accompany him to the hospital. I think the delay was forty-five minutes or an hour. Then he was put in the caboose and a special engine attached to the caboose by which he was conveyed to the hospital at Bluefield.

Q. I suppose it was necessary to have amputation of that limb?

A. Oh yes, there was no question about that, but we were not prepared—or at least it wasn't the time or place to do it, there. Of course anybody could see that his limb would have to be amputated, and we thought it would be safer to have it done in the hospital, where he could be better attended to.

Q. Dr. Kelly, I will ask you if during the time you were with

Mr. Earnest he made any statements in regard to how the accident happened, and if so state fully your recollection of what the statements were.

A. Well, I would state that I did ask him the question, and my reason for asking him that question was that the surgeon is furnished with a blank, and among other information that we always get it is very necessary to find out how the thing happened. I asked him the question how it happened that he got injured, and he said that: "Oh," he says, "I don't blame anybody. I wasn't  
318 watching out as close as I ought to have been, and my attention was attracted at the time to passing train on which my brother was fireman." The idea I gathered from him was that it was carelessness that he was caught.

Q. Whose carelessness?

A. That it was fireman D. E. Earnest's carelessness.

Q. Did you hear him make that statement more than once?

A. I think I did. Some of the railroad men asked him. They felt so much interested in him that they would ask him "How did you happen to get hurt?", and I heard him make the statement to probably two or three others in about the same way.

Q. Do you recall what time it was that he made that statement?

A. I believe it was before I began to dress his leg. It was soon after I laid him on the table, and it was probably not more than ten minutes after I saw him that I asked him the question.

Q. Do you recall whether or not it was before you gave him—Or did you give him any hyperdermic injection of morphine or anything of the sort?

A. I did give him a hyperdermic injection of morphine.

Q. When?

A. I rather think it was before I gave him the hyperdermic. But I will state along that line that I didn't give him enough to  
319 affect his mind or anything of that sort but merely to quiet him and relieve his pain.

Q. What was his condition mentally?

A. All right. His mind was as bright as a dollar and just as active as could be.

Q. Witness is with you.

Cross-examination:

By Mr. MOORE:

Q. Doctor, was Earnest suffering from any shock when you got there?

A. Yes, sir; he was suffering from shock, suffering from pain and shock.

Q. He was suffering both from pain and shock?

A. Yes, sir.

Q. Was he also suffering from loss of blood?

A. Not much. He hadn't lost much blood, a little.

Q. He had lost a little blood?

A. Some blood, yes sir.

Q. Was he suffering very greatly?

A. Well, yes I think he was. Of course a man would naturally I suppose. He seemed to be suffering more from loss of his leg, that is, the fact that he had to lose his leg. He said his leg was numb, but the boy seemed to be anxious about himself, and of course he was very much upset in every way.

Q. Wasn't he scared?

320 A. No, I don't know that he was scared.

Q. Well, if he wasn't scared what did he seem to be anxious about?

A. Well, he was just anxious because he thought he had lost his leg and knew he was going to be a one-legged man the balance of his life.

Q. He knew then that he would be a one-legged man the balance of his life?

A. He did.

Q. Didn't he also say he was afraid he was going to die?

A. No, sir; he didn't say he was afraid he would die. He said, do you think I am going to get over it, and I said certainly you will just lose your leg. I assured him of the fact that I didn't think there was any danger of his dying. He was like anybody else who loses heart that way, he wanted to know all he could.

Q. He was afraid he was going to die?

A. He didn't say whether he was afraid he was going to die or not.

Q. If I understand you at the time he was talking to you he was suffering from the shock?

A. Yes, sir.

Q. And suffering from the pain on account of loss of his leg?

A. Yes, sir.

Q. And was anxious enough about his condition until you told him you thought it wouldn't kill him?

321 A. Yes, sir.

Q. You gave him some morphine and don't know whether you gave it to him before he made the statements or afterwards?

A. I don't know about that time, but I gave him a medium dose of morphine to quiet the pain and nervousness.

Q. Wasn't it your business to give him morphine just as soon as you could see what was the matter?

A. I did. I gave him morphine just as soon as I saw him. It took me some little time to fix up the morphine and all the time I was talking to him about how it happened.

Q. While you were fixing up the morphine you were getting information upon which to make a report to the railroad?

A. Well, I don't know about that. I don't know that it was for information for the railroad so much as because I felt an interest in the young fellow's accident. I said "How in the world did this happen." But then that is the question that would have been asked in order to fill up the blank setting forth his statement as to how it happened.

Q. Do you get your information in that casual way to fill up blanks?

A. Sometimes I do. If I get the statement it **don't matter** I get it. If I ask him how it happened I suppose that he tells the truth about it. In that instance I did, I asked him how it happened.

322 Q. Did you have that blank with you?

A. No, sir; I did not.

Q. When did you make up the blank?

A. I made up a memorandum right there on a piece of paper, and afterwards transferred it to the blank.

Q. You sent that to the railroad?

A. Yes, sir.

Q. You have seen it since?

A. Yes, sir; I think it is here.

Q. It is here in court?

A. Yes, sir; I think so.

Mr. MOORE: Will you gentlemen representing the defendant company let me see that report?

Mr. SMITH: We have not introduced it in evidence, but will let the court say.

The COURT: The defendant has not based any evidence on or asked about the contents of the report. The fact that the witness as explanatory of his evidence has referred to a report made by him I don't see why I should require the defendant to produce the report.

Q. Did you embrace in that report the statement that the boy had made to you?

A. I did.

Mr. MOORE: Now, if your honor please, the witness having made a written report of the statement made to him by plaintiff we ask that it be produced. We also couple with that request the statement that the report is now here in court. That report is the best evidence of his statement.

323 Judge JACKSON: It is customary and necessary for a company to take statements in order that it may have records of these matters. If Mr. Moore's contention were correct then defendant corporations could not introduce a witness on the stand but would be confined entirely to the statement he made. These are our private papers and we have not asked to introduce any of them. We think the request the gentleman makes is to say the least of it somewhat unusual.

The COURT: To my mind the best evidence rule has no application here? Under the common law when a party calls upon an adverse party to produce a document it gives no other right to the party making the call than to introduce secondary evidence if that call is refused. Under the Federal statute the opposite party can be required to produce documents on pain of letting the case go against him for failure so to do, but that statute as I recall it requires notice and proof that the document is material. There is no evidence here to the effect that the report of the witness called for by plaintiff would contradict his testimony given here on the stand, and counsel for

plaintiff state that neither they nor their client has ever seen that report and consequently they cannot know that it will contradict the witness. I feel constrained to rule that the defendant need not produce the report.

Plaintiff excepts.

Q. How long after the young man was hurt before he started to the hospital?

A. Well, I don't know, can't say exactly, but think it must have been 45 minutes or something like that. No, after he was hurt, you asked. It probably was an hour after he was hurt before he started to the hospital. We had to wait awhile until his brother came.

324 Q. Did you go with him to the hospital?

A. No, sir; I did not.

Q. How many written statements or reports have you made of this?

A. One.

Q. When was the last time you saw it?

A. Saw what?

Q. The statement or report you made of it.

The defendant company, by its attorneys, object- to a continuation of examination upon a written report which has never been introduced in evidence, not referred to on the examination-in-chief except a statement by witness that he had to make such a report, and then he did so merely explanatory of his answer, and the court having ruled that the report cannot be required.

The Court: I will overrule the objection to the question because I think it proper cross-examination.

Defendant excepts.

A. The report, I have seen it since this trial began.

Q. Who showed it to you?

A. I have seen it.

Q. Who showed it to you?

A. Mr. Haller I believe had it.

Q. How many times did he show it to you?

A. I saw it only once. I asked him if he had the report and he said he had. I just saw it casually; I didn't read the report over.

I just know he had it.

325 Q. When was Mr. Haller talking to you about the case last?

A. Well, he hasn't been talking to me any about it except since he has been here as a witness. I never saw him, and didn't know anything about the case coming up until I came down here. He hasn't been talking to me much about it.

Q. He has been talking to you about the case since you have been to court?

A. He has incidentally referred to it, to my staying here so long, and so on.

Q. This written report was made in February 1909?

A. I think so. As you have asked the question I will say this.

My mind is perfectly clear on everything I have said here as regards what I have put down in that report. I can state it positively without refreshing my mind. I can state everything that happened that night as to what the young man said. I wouldn't have to refresh my mind on it if I wanted to.

Q. How come you to read the report that you made after coming here?

A. I didn't read it. I asked Mr. Haller if he had it, and he said he had.

Q. You saw it?

A. I saw a bunch of papers, and he said my report was there.

Q. Did you read it?

A. No, sir.

326 Q. You didn't read it at all?

A. I just read enough to see it was my report, but didn't read it over.

Q. You didn't read any part of it at all?

A. No, sir; except to see that it was the report I made. I saw my name to the bottom of it, and didn't read it over.

Q. Who is this Mr. Haller you are talking about?

A. He is claim agent of the railroad company I believe.

Q. He is a special agent in charge of this case?

A. I don't know what office he has. I know him as a company man, as in the employment of the Norfolk & Western Railway Company, is all I know. I don't know what position he has or what office.

Q. Mr. Haller then is in charge of this case for the Norfolk & Western Railway?

Mr. SMITH: I thought I and my associates here were in charge of this case.

WITNESS: Well, I didn't know that. I don't know who is in charge of it.

Judge JACKSON: Mr. Moore has tried to run his side and ours, too, it would seem.

Mr. SMITH: Do you know who is in charge of Mr. Earnest's case?

WITNESS: I don't know, sir. It seems there are some attorneys there.

Q. Mr. Smith tells you he is in charge of it?

A. I don't know who is, except what Mr. Smith says.

327 Q. What language did Mr. Earnest use when he was describing this thing?

A. Mr. Earnest said—Now I will have to go over all that again. I knew him and when I saw him my manner was about this: "Hello, Earnest, how in the world did you get hurt this way; how did it happen?" As I said I state again I did it as much to inquire because of the interest I felt in the boy's being hurt as for any other purpose, or probably more at that time. I said "How in the world did this happen; how did you happen to let the engine run over you?" His remark was this, and he seemed to have a good

deal of remorse about him that it happened: "Oh, I think it was my own carelessness. If I had been watching a little closer it wouldn't have happened." He said "I saw this engine passing and my attention was called to that and I didn't notice the other man coming up."

Q. And you say in your report to the company you embraced that?

A. I made that exactly like I told you, because I remember positively his language.

Q. Well now, you haven't related it this way exactly like you did twenty minutes ago.

A. Well, if I haven't I tried to at least.

Q. You tried to?

A. Yes, sir.

Q. You haven't used the same words this time that you used twenty minutes ago. What words did you use in that report?

Mr. SMITH: We object. Witness cannot tell just exactly the words he used in a report made two years ago, although he can tell the statement made by witness. Mr. Moore couldn't use today the words he used in a statement two months ago, and no other living man can. I think this irrelevant, incompetent and immaterial.

Q. Well, did Mr. Earnest use the words "censure" or "balk" in his statement to you?

A. I don't think he did.

Q. You don't think he did?

A. I don't think he used the words censure or balk. He may have used those words in describing it to somebody else, but I don't think he used those terms to me.

Q. We are through.

(And witness leaves the stand.)

329 Dr. W. E. Cook, for Defendant.

Examined in chief by Mr. SMITH:

Q. You are a physician, are you?

A. Yes, sir.

Q. Where do you live, Doctor?

A. I live at Algoma, W. Va.

Q. How far is that from North Fork?

A. About seven or eight hundred yards, or about half a mile I guess.

Q. Do you recall the night D. E. Earnest was hurt by being run over by an engine?

A. Very distinctly, sir.

Q. State to the jury if you were called to assist in ministering to Mr. Earnest, and if so what time you reached the office and what you all did, in connection with getting him ready to send to the hospital, if you did anything.

A. I was called to this case by order of the railroad company



about—well, something after eleven o'clock. I don't know just when but a few minutes from half past eleven, somewhere along there. My satchel is usually ready for these cases, keep it ready most all the time, and I just gathered my satchel and went  
330 right on. I guess I reached the place where Mr. Earnest was at the time within a few minutes after I was called. I usually walk that distance in about seven or eight minutes in a hurry. It doesn't take but a little while to get down there; it is a good road and all. When I reached the scene of the accident they had removed him from the track where he was hurt up to the old railroad office at North Fork. He was lying on a little table or something they had there. And when I examined him in company with Dr. Kelly—Dr. Kelly, who just preceded me, happened to be on the ground at the time, but he didn't have anything to fix him up with. I came in with my satchel full of dressings, and he and I then fixed up his leg. His leg was torn pretty bad from the knee down and into the knee joint, but there was no hemorrhage to amount to anything. There never is very much in this kind of cases. As a usual thing they don't bleed very much; in fact, I have never seen a fatal hemorrhage from one of these cases yet. We washed him up, and gave him a hypodermic or morphine to make him easy and comfortable, and bound up his leg with gauze and cotton bandages, and made him as comfortable as we could under the circumstances. By the time we had him ready the railroad had an engine and caboose ready to take him to the hospital.

Q. Now, I will ask you if Mr. Earnest made any statement there in reference to how the accident occurred.

A. He did.

331 Q. If so what were they.

A. He did make a statement. He said in my presence that it was all his own fault, and he didn't blame anybody for the accident but himself. He said he attempted to throw a switch or something of the kind, and he didn't blame the railroad company for that, that it was his own fault. That is all I know.

Q. Do you know anything about electric lights on the yard there?

A. Well, I know there are some lights, but don't know how bright they shone, nor how well they are equipped. There are some lights there, because I have gone all over that track at all hours of the night, and day too, and this little path around to where the accident is there is a good road that you can drive four horses along right down by the side of the track. There are some lights down there, and I know that you can see that path distinctly without any trouble.

Q. Do you know where No. 2 switch is?

A. Yes, sir.

Q. How is it about No. 2 switch?

A. Everything is clear, nothing in the way, no obstruction or anything of the kind. There is a road that you can drive four horses abreast down by the side of the track, along the bank where the switch lever is.

Q. Well, do you know how it is in reference to light around about No. 2 switch, whether it is light enough there from the lights in the yard to see the track?

A. Well, I couldn't state that, Mr. Smith. I don't know enough to say about that, never noticed that very well.

Q. Take the witness.

Cross-examination.

By Mr. MOORE:

Q. You and Dr. Kelly were there together?

A. We were, sir.

Q. Dr. Kelly heard these statements that you heard?

A. I should suppose he did, he should have.

Q. There was nothing to have kept Dr. Kelly from hearing them?

A. Nothing.

Q. Earnest told you that he was trying to throw a switch or something and got run over?

A. He mentioned that he was attempting to throw a switch, or run around the engine, or something to throw a switch, and was hurt.

Q. And he was run over?

A. Yes, sir.

Q. He stated then that it was all his own fault?

A. He did.

Q. And that he didn't blame anybody for it?

A. No, sir.

Q. That he was attempting to throw a switch or something of that kind and that he got run over.

A. Yes, sir.

Q. Was that all the statement that he made?

A. That is all I heard him make.

Q. Well, did you make a written report of that to the railroad company?

A. I did not, sir.

Q. Have you ever made a written report of it?

A. Not in this case, no sir.

Q. Have you seen since you came to court Dr. Kelly's written report?

A. I saw it.

Q. When did you see it?

Defendant company, by its attorneys, renews the objection heretofore made to cross-examination of witness on a report not in the case, and especially when this witness says he has never made any report, the same in any event being incompetent, immaterial and irrelevant.

Objection overruled.

Defendant excepts.

A. I have seen part of it.

Q. Who showed it to you?

A. Didn't anybody show it to me especially.

Q. How came you to see it?

A. I saw it laying on the desk over in Mr. Smith's office.

Q. You read it, did you?

A. Part of it, just enough to verify my own memory, but that is what I heard him state.

334 Q. Yes, that is right. So you read enough of Dr. Kelly's report to verify your own memory of what you heard the boy state there that night? Did Dr. Kelly's report state that the boy said it was all his own fault, that he didn't blame anybody, that he was attempting to throw a switch or something of that kind and got run over.

Defendant company, by its counsel, objects to this question because it is an attempt to get in Dr. Kelly's report, as well as for the reasons heretofore set out, being incompetent, immaterial and irrelevant.

Objection overruled.

Defendant excepts.

A. I did not read that far into it. The only thing I referred to was to see about the statement he made as to getting from his engine and about the switch. I didn't read the whole clause of it at all. My memory is distinct enough for me to know that he made this statement without referring to Dr. Kelly's report.

Q. Did you find on reading Dr. Kelly's report that his report supported your recollection of it?

A. So far as in relation to the switch business it did.

MR. SMITH: In relation to what?

WITNESS: In getting from the engine about this switch, crossing in front of engine.

Q. Well, did Dr. Kelly's report have something in it about crossing in front of the engine?

A. I don't remember distinctly. It seems to me it did.

335 Q. But did Dr. Kelly's report have something in it to the effect that Earnest said he was working at the switch, trying to throw the switch, or set the switch, when he was run over?

A. I don't think so.

Q. Then if Dr. Kelly's report did not have that in it it wasn't according to your recollection, was it?

A. What wasn't according to my recollection?

Q. You have stated here, if I understand you, that the boy was trying to throw the switch when he was run over?

A. No, he didn't say he was trying to throw the switch. He said he went around the engine to throw the switch. He didn't say you understand that he was trying to throw the switch.

Q. Well, does that part of Dr. Kelly's report then corroborate your memory?

A. Which do you mean, in throwing the switch?

Q. Yes.

A. Yes, it says something about throwing the switch. I don't remember distinctly what it says; I just glanced over it once.

Q. So Dr. Kelly's report does say the boy said he was trying to throw a switch when he was run over?

A. I don't know whether he was trying to throw the switch or not, but something about the switch.

336 Q. Dr. Kelly's report does say something about handling the switch when he was run over?

A. Yes, sir; I think so.

Q. You have seen that report here in the court room too haven't you?

A. I have not.

Q. Did you give this boy any morphine that night?

A. I don't remember distinctly, it seems to me that we did though. We usually do that. It is a kind of routine practice we have in these cases, to give them something of that kind, but I don't remember distinctly whether we did or not. But I know we made him as comfortable as we could.

Q. Has morphine any effect on them towards making them flighty or somewhat irrational?

A. Oh, well, it will if you give them too much.

Q. If a man had his leg cut off, and was suffering severe pain, and suffering from physical and mental shock, wouldn't you give him morphine enough to quiet him and make him irrational?

A. No, I wouldn't give that much to him possibly at once. I would give cautiously, giving him a medium dose, and if that didn't relieve him enough I would give him more.

Q. As a matter of fact before that boy was sent to the hospital wasn't he given morphine so that he was thoroughly under the influence of it?

337 A. He wasn't thoroughly under the influence of morphine. In the most of these cases they suffer shock, but he was perfectly rational when he left our place.

Q. Was he thoroughly conscious?

A. Oh yes.

Q. Was he comfortable?

A. As comfortable as we could make him under the circumstances, yes.

Q. What was it that made him comfortable?

A. Oh well, there is nobody that has been hurt in an accident of that kind that would possibly be what we term comfortable, but comfortable to a certain extent, as we would term comfortable in this case. Of course I feel very comfortable now; he wasn't as comfortable as I am.

Q. His mental condition was not as good as yours is now either?

A. Well, it may not have been quite as good.

Q. Doctor, wasn't he madly scared and afraid he was going to die?

A. He didn't show any signs of it in my presence.

Q. You mean any signs of dying?

A. Of his being scared.

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Q. Didn't he ask you doctors if you thought it would kill him, and if you thought he would get well?

A. I don't remember hearing him ask any question of that kind. He may have before I came in.

Q. Didn't you hear him beg John Drawbond to go with  
338 him to the hospital, and also to get his brother to quit firing for fear he would get killed?

A. I heard him ask somebody to ask his brother to quit firing, but didn't hear him begging John Drawbond to go to the hospital.

Q. You heard him ask somebody to get his brother to quit firing?

A. To persuade his brother to quit firing.

Q. Is that in Dr. Kelly's report?

A. Oh, that didn't have to go in the report, no sir, don't think it is in it.

Q. Do you remember whether the boy Earnest that night used the word balk or the word censure?

A. Used what?

Q. Balk I think it is.

A. Oh no, I think that is the statement he made below there, and I didn't hear him make that statement.

Q. Did you hear him use the word censure?

A. No, sir; I didn't hear him. He said he didn't blame anybody but himself, and didn't blame the railroad company.

Q. That is all.

(And witness leaves the stand.)

339 W. C. HARRISON—For Defendant.

Examined in chief by Mr. SMITH:

Q. What is your name?

A. Harrison, W. C.

Q. What is your business?

A. Night yardmaster at North Fork at the time of the accident. I am night yardmaster at Vivian now.

Q. You were night yardmaster at North Fork at the time of the accident to Earnest?

A. Yes, sir.

Q. Now you are night yardmaster at Vivian?

A. Yes, sir.

Q. Do you remember the night that D. E. Earnest was hurt?

A. Yes, sir.

Q. Where were you that night?

A. I was at North Fork working. I was at the yard office at the time he was hurt.

Q. At the yard office?

A. Yes, sir.

Q. Did you have anything to do with calling this man for duty?

A. Why, I order them. I didn't call them, but I ordered them from the roundhouse and they then called them.

340 Q. What were they called for that night?

A. Called for pusher between Ruth and North Fork, or Coaldale and North Fork.

Q. Do you know at what time they reported?

Q. Yes, sir; reported at eleven o'clock.

Q. Were you present at the office when they reported?

A. I was at the yard office, and they reported at the roundhouse.

Q. They didn't report at the office you were at then?

A. No, sir.

Q. You didn't see the accident, Mr. Harrison?

A. No, sir.

Q. How long after the accident before you saw Earnest or do you know how long it was before you saw him?

A. Why, I don't know exact time, but it wasn't over ten minutes though.

Q. Where was he when you saw him?

A. Where was Earnest?

Q. Yes.

A. He was lying on the right hand side of the track, and on the right hand side of the engine near No. 2 switch.

Q. Where was he carried from there?

A. He was carried to the yard office.

Q. Did you accompany him to the yard office when he was carried to the yard office.

A. Yes, sir.

Q. State if you heard D. E. Earnest make any statement  
341 in reference to how the accident happened, either while lying by the side of the track or after he had been gotten to the yard office. And if so, state where they were made and what they were.

A. After the accident happened I went down to the engine and Earnest says to me "Harrison, I believe I am going to die." I said "No" that he wasn't hurt any more than his leg was cut off I didn't think. I asked him how it happened, and he told me he was waving at his brother, or the fireman, and I don't remember which, on 82, which was passing, and let the engine slip up on him before he knowed it, and that he didn't blame any one at all except himself, that he didn't blame Drawbond.

Q. Where was that statement made to you?

A. It was made down at the track, down by the side of the engine where he got hurt.

Q. How long after you got to him?

A. Right immediately after I got down there.

Q. That was before he was taken to the office?

A. Yes, sir.

Q. Did you accompany him to the office?

A. Yes, sir.

Q. Were you in the office while they were dressing him or fixing him up to send him to the hospital?

A. Not all the time, but I was in there a part of the time.

Q. Do you recall his making any statements in the office?

342 A. I heard him tell about the same thing he told me, once or twice that night. I didn't hear who he was talking to though.

Q. Do you know where the lights are in that yard, the electric lights?

A. There is one at the coaling station, and there is one at the road crossing right this side of the lead——

Q. Wait one minute and let me get the map. Do you understand this drawing. (Defendant's Exhibit B.)

A. This is the coaling station here, isn't it?

Q. Yes.

A. This is one right here at this coaling station. This is the station siding right here, isn't it?

Q. Well, I don't know much about the drawing. This is marked "station" here.

A. This is the siding for the station, and it is right along here I think.

Q. Point that out to the jury.

A. One is right here at the coaling station, and the other one is right along there. And then there is one on up here by the station, up about here somewhere.

Q. Is there an arc light near a saloon somewhere?

A. There is one in the saloon door. But there is an arc light on the railroad right about here.

Q. What is the effect of the lights on the yard? Can you see ordinarily the rails and the switches?

A. Yes, sir; as an ordinary thing you can see the rails all  
343 right.

Q. I will ask you as an ordinary thing can you or not see where the switches are, whether they are open or closed?

A. For quite a reasonable distance, yes.

Q. For a reasonable distance?

A. Yes, sir.

Q. What is a reasonable distance?

A. I don't know. I could tell it fifty or seventy-five feet anyway.

Q. You could tell it for 50 or 75 feet anyway?

A. Yes, sir.

Q. Mr. Harrison, in your duties there as yardmaster did you ever let the engines out?

A. Yes, sir; have done it lots of times.

Q. I mean, by your going ahead and piloting the engine out. Did you ever do that?

A. Yes, I have.

Q. What is customary then when you get ahead and pilot the engine out?

A. Well, when I wanted one out in a hurry I would go to the engineer and ask if he was ready, and if he said he was, for instance if he was on No. 3 I went up to No. 3 switch and waved him ahead, and went on ahead of the engine to the main line switch and threw that. Of course if there were any switches wrong

between there I always throwed them as I went along.

344 Q. Did you wave him ahead after you waved him ahead first?



A. I waved him ahead on No. 3 switch at No. 3 track and then at main line switch.

Q. And that is all?

A. That is all.

Q. Was that the usual way that they did there in the pusher service?

Plaintiff, by his counsel, objects because leading.

Objection sustained.

Q. Stat- if that was the usual way in pusher service of operating that yard and piloting engines out?

A. The only way I ever saw it done was that way. I always waved ahead at the first switch, and then at the main line switch. Didn't have any signals between the switches.

Q. You didn't have any signals between the switches?

A. No, sir; I always waved at the first switch and got on the lead and then went on and waved him ahead at the main line switch.

Q. Take the witness.

Cross-examination:

By Mr. MOORE:

Q. You are not a fireman?

A. No, sir.

Q. You are not a switchman?

A. No sir.

345 Q. Are you familiar with the rules and duties governing firemen and switchmen?

A. Fairly so.

Q. If switch No. 2 was against the engineer and the fireman had trouble or delay in fixing it what kind of signals would he give?

A. He should wave him down.

Q. After he waved him down and fixed it what kind of signal would he give?

A. He should wave him ahead then.

Q. Well, after he got to the switch the first thing he would have to do would be to examine it and see whether it was in shape?

A. Why, it is not necessary to get down and examine it. You can tell by walking along whether it is all right.

Q. He would have to examine it to see?

A. He could tell 50 feet before he got there.

Q. He could?

A. Yes, sir.

Q. You can see the point of the switch 50 feet away from you?

A. Yes, sir; as a usual thing when you have a light.

Q. As a usual thing when you have a light you can see the switch 50 feet away and tell which way it is set there?

A. Yes, sir.

Q. Is that a signal switch?

A. A signal switch?

346 Q. A signal on the switch lever?

A. A target on it, do you mean?

Q. Yes.

A. It don't make any difference whether it has a target on it or not you can see it.

Q. You can see the needle point 50 feet away and tell the position the switch is in?

A. Yes, sir.

Q. At night?

A. Yes, sir; with a light.

Q. With a lantern or torch?

A. Yes, sir.

Q. Fifty feet is a distance about twenty feet longer than from one end of this court room to the other?

Mr. SMITH: I don't think that is right. I think this court room is as much as fifty feet long.

A. That is what I think about it.

Q. You think the court room is 50 feet long?

A. It looks that way to me.

Q. Then if you were in one end of the court room with a lantern or torch in your hand you could see the needle points of the switch at the far corner of the room even at night by the aid of your lantern or torch, and tell whether or not it was in place?

A. Yes, sir.

Q. When the needle points are thrown away from the rail so as to let the wheel pass the needle point how far away from the rail is it, an inch or anything like that?

347 A. Which needle points are you talking about?

Q. The needle points of the switch.

A. There is two needle points, one close up when closed and the other one open. The one that's open is the one you are talking about or the one that should be closed?

Q. Either one. Could you see those points and see whether or not they were in position when fifty feet away at night by a lamp?

A. Yes, sir.

Q. So then Mr. Earnest ought to have been able to see those needle points while 50 feet away and before he got to them?

A. Yes, sir.

Q. That night by the light of his torch?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Well, as a matter of fact didn't you think he should have seen them a little farther than fifty feet?

A. It depends upon how good his eyesight is. I can see them that far, but I don't know how far he could see them.

Q. Have you just ordinary eyesight or extraordinary?

A. Just about ordinary. It isn't quite ordinary.

Q. Your eyesight isn't quite ordinary?

348 A. I am a little near-sighted.

Q. You are a little near-sighted, and can see those needle points fifty feet from you?

A. Yes, sir.

Q. Did you make a written statement of this accident?

A. Yes.

Q. Did you embrace in that written statement what this boy Earnest said about the accident?

A. Yes, sir.

Q. How many written statements did you make?

The defendant company, by its attorneys, objects to the question because irrelevant and useless consumption of the time of the court.  
Objection overruled.

Defendant excepts.

Q. You made a written statement?

A. Yes, sir.

Q. How many written statements did you make?

A. One.

Q. Have you seen it since you came here?

A. No, sir.

Q. Did you keep a copy of it?

A. No, sir.

Q. Have you seen it since this trial began?

A. No, sir; I haven't seen it since I wrote it.

Q. Have you seen Dr. Kelly's written statement since you came here?

The defendant company, by its attorneys, object to question as immaterial and irrelevant.

349 Objection overruled.

Defendant excepts.

A. No, sir.

Q. The boy did say that night he believed he was going to die?

A. That is what he told me when I went down to the engine.

Q. Did he say anything about balking along between the tracks and getting run over?

A. About balking along?

Q. Yes.

A. No, he didn't tell me anything about that.

Q. Was John Drawbond there while you were there?

A. I don't remember seeing John there after I went to the engine. I saw him around there several times, around the office after he had gotten up there, but don't remember seeing him at the engine after they had gotten him up to the office. He came up and told us about the accident happening, and I went down there.

Q. The boy stayed in your office until he was taken to the hospital?

A. Yes, sir.

Q. And those statements that were made after he was taken to your office then were made there where you could have heard them, I suppose?

A. If I was in the office. I couldn't stay in there all the time. I was out on the yard several different times making arrangements to get him to Bluefield.

350 Q. Do you remember his saying anything about his trying to throw a switch when he was run over?

A. No, sir; I didn't hear him say anything of the kind.

Q. You didn't hear him say anything about balking along in front of the train?

A. No, sir; I only heard him say the train slipped up on him.

Q. Did you hear him say anything about not censuring any one? I mean to ask, if he used the word "censure"?

A. I never heard him use that word; don't remember that he did. I heard him say he didn't blame Drawbond for it, and didn't blame any one except himself.

Q. Did you hear him in that same conversation begging Drawbond to go with him to the hospital?

A. No, that was before I got down there.

Q. Well, after you got up to the station did you hear him ask John Drawbond to go with him?

A. I don't remember hearing him talk to Drawbond.

Q. Did he ask some of you to get his brother to quit firing for fear he would be killed?

A. That is what I heard he said but I didn't hear him say it.

Q. Where is your written statement that you made?

A. I don't know, sir.

Q. Did you see John Drawbond at the office after Earnest was carried to the office?

A. After he was carried to the office?

351 Q. Yes.

A. I don't remember particularly seeing him around there, but he was around there all the time he was there until when they left with Earnest.

Q. When you got to him did he seem to be scared?

A. No, he didn't seem to be scared.

Q. Was he talking about dying?

A. He said something when I first got down there about dying, and I told him I didn't think that he was hurt any more than his leg cut off.

Q. Did he seem to be excited or was he in a condition that he would hardly know what he was talking about?

A. He seemed to be perfectly rational, and to know everything going on, and talked with good sense.

Q. Perfectly rational?

A. Yes, sir.

Q. Not excited at all?

A. Not any more than any one else would be who got hurt.

Q. Are you positive that he said he was waving at his brother on that train?

A. For his brother or the fireman on there and I don't remember which. His brother was firing the train. I couldn't say whether he said his brother or at the fireman on there.

Q. You were yardmaster were you, as you stated awhile ago?

351½ A. Yes, sir; at North Fork at the time Earnest was hurt.  
Q. I will ask you if you enforced Rule 522 while you were there as yardmaster, and I now show you the rule so you may read it.

Mr. SMITH: He is your witness on all that.

Mr. MOORE: I don't care whose witness he is.

A. Yes, sir; I always tried to.

Q. It was your duty to endorse it, was it?

A. Yes, sir.

Q. Did you do your duty?

A. I tried to, yes sir.

Q. That is all.

(And witness leaves the stand.)

352 R. R. STUART—for Defendant.

Examined in chief by Mr. SMITH:

Q. Mr. Stuart, what is your name?

A. R. R. Stuart.

Q. Where do you live?

A. I am working at Vivian, but live at Tazewell.

Q. You live at Tazewell?

A. Yes, sir.

Q. And work at Vivian?

A. Yes, sir.

Q. Where were you working on the 13th of February 1909?

A. At North Fork.

Q. What were you doing there?

A. Checking.

Q. What is a checker?

A. Checking the coal field operations. Getting the number of loads and empties at each operation.

Q. Did you see D. E. Earnest the night he was hurt and when he was hurt?

A. After they brought him to the office, yes sir.

Q. Where did you see him?

A. I saw him after they brought him in there and laid him on the table.

353 Q. Did you hear him make any statement in reference to how the accident happened, and if so tell the jury what that was?

A. I heard him talking in a general conversation, yes sir.

Q. What did he state?

A. He said he was letting the engine out, and he come up the lead, and that he crossed over on the track and No. 82 passed, and his brother was on the pusher engine of 82, and he waved at him, and he fell then over the track.

Q. He said that No. 82 was passing?

A. Yes, sir.

Q. And he was waving at him?

A. Waved at his brother who was a fireman on the pusher engine on No. 82.

Q. And that he fell on the track?

A. Yes, sir.

Q. How did he say he fell?

A. He didn't say, or I never heard him say at least.

Q. Is that all you recollect of what he said?

A. Yes, sir.

Q. All right.

Cross-examination.

By Mr. MOORE:

Q. Did you make a written statement of this to the railroad?

354 A. Yes, sir.

Q. Have you seen that written statement since you came here?

A. Yes, sir.

Q. Isn't it laying there on the table in front of Mr. Haller?

A. I don't know, sir, I haven't seen it.

Q. Have you read that statement since you came here?

A. Yes, sir.

Q. How many times have you read it since you came?

A. Once.

Q. Where were you when you read it?

A. I was in Mr. Smith's office.

Q. Was Mr. Haller present?

A. Yes, sir.

Q. Is that written statement like the statement you have made here today before the jury?

The defendant company, by its attorneys, objects to the question as irrelevant and immaterial, and not cross-examination on anything asked in chief.

The COURT: Gentlemen, the theory I am going on is this: While plaintiff's counsel cannot compel production of written statements, yet it is proper when the accuracy of a statement of the witness is sought to be determined to make such inquiry on cross-examination. It may be asked on cross-examination with a view to showing whether witness now has as vivid and clear independent recollection of the occurrence as is claimed or whether his recollection has been aided by something he has read since. I therefore overrule the objection.

Defendant excepts.

355 A. Yes, sir.

Q. Did you see anything in that written statement about Earnest waving at his brother?

A. Yes, sir.

Q. As a matter of fact don't you know that he did not know where his brother was?

A. No, sir; I don't know that he didn't know.

Q. You don't?

A. No, sir.

Q. Who took that written statement from you?

A. Mr. Haller.

Q. Mr. Haller took it. Who wrote it for you?

A. Mr. Haller.

Q. Mr. Haller write it himself, did he?

A. Yes, sir.

Q. How did Mr. Haller write it?

A. As I dictated it.

Q. Did he write it on a typewriter?

A. No, sir; with a pencil.

Q. Did you read it over when he wrote it?

A. Yes, sir.

Q. Did you make any corrections in it?

A. One, yes sir.

Q. What was that correction you made?

A. It was switch and should have been track. He had switch and it should have been track.

Q. Well tell us now just what the trouble was that you corrected that statement?

356 A. He misunderstood me I suppose.

Q. Mr. Haller then had written switch when it should have been track?

A. Yes, sir.

Q. What switch was Mr. Haller talking about?

A. I don't know, sir.

Q. Which track were you talking about?

A. I was talking about the rail.

Q. You were talking about the rail?

A. Yes, sir; the rail in the track.

Q. He finally got it in the statement track when you were talking about the rail. Is that right?

A. No sir; that is not what I said. I think he had it switch when it should have been track, or rail, either one.

Q. Mr. Haller got it down at the switch when it should have been track or rail?

Mr. SMITH: No, sir; witness didn't say that Mr. Haller got it "at the switch" when it should have been track or rail. Witness had no "at" about his testimony.

Q. You have seen the statement since you came here to court?

A. Yes, sir.

Q. Has it been typewritten since you gave it?

A. I haven't seen a typewritten copy.

Q. How long a statement is it?

357 Defendant company, by its attorneys, objects to the question and says same is incompetent, immaterial and irrelevant, and a useless consumption of the time of the court.

The COURT: I cannot see the materiality of that question.

Mr. MOORE: Well, since your honor has asked the question we are not certain that it is and will not insist on an answer.

The hour for recess having been reached a recess was taken until 2:00 p. m. with the cross-examination of this witness not closed.



Examined in chief by Mr. SMITH:

Q. What is your name?

A. M. D. Hall.

Q. What is your business, Mr. Hall?

A. Well like now I am a miner.

Q. A miner.

A. Yes, sir; assistant mine foreman.

Q. Where?

A. In West Virginia.

Q. What were you doing in February 1909?

A. I was night police at North Fork.

Q. Night police at North Fork?

A. Yes, sir.

Q. Were you on duty the night that Mr. D. E. Earnest was hurt in North Fork yard on February 13, 1909?

A. Yes, sir; I was there the night he was hurt, but I could not recollect the date, whether it was the 13th or not. I never taken any memorandum or anything of it, but it was some time in February.

Q. Did you see Mr. Earnest that night?

A. Yes, sir; I did.

Q. Where did you see him?

359 A. Well, the first time I saw him that night I met him as he was going down to report for duty. The next time I saw him he was laying by the side of the track with one leg cut off, or very nearly cut off.

Q. Cut nearly off?

A. Yes, sir; somewhere right along there some place. (Indicating below right knee.)

Q. Where was that, at what track?

A. Well, not being a railroader I don't know, but think they call it No. 2 switch. I never railroaded any and don't know anything about the numbers of the tracks, but that is what they told me, No. 2 switch.

Q. You know the location, do you?

A. Yes, sir; I know the location, because I have been over the place, and had for a year at that time, had been going over it six or eight times a night.

Q. Did you hear Mr. Earnest make any statement as to how the accident happened, and if so state to the jury to the best of your recollection what statement he made.

A. Well, the first of it I was in the railroad office up there talking to Mr. Harrison and Mr. Drawbond he come up and says, "I have cut Dave——"

Mr. MOORE:.. Wait! You can't tell what Drawbond said.

Q. Well, you found out he was hurt?

A. Yes, sir.

Q. State what you did.

360 A. I run right on down to where he was at. When I got there there was a couple of colored fellows, as well as I recollect, standing there, and one oder one come up about the same time I did.

Q. A colored man?

A. Yes, sir.

Q. Do you know the colored men?

A. I remember one of them now, but if I knew them all at the time I never paid any attention to them and don't remember. Dr. Viney, a colored fellow, he and myself tied a string around his leg.

Q. What sort of string?

A. A shoestring.

Q. Where did you tie it?

A. Right above his knee as well as I remember. I asked him how it happened, and he said that he was coming ahead of the engine throwing switches, and was watching to wave at his brother—I wouldn't say for certain his brother but some one, on 82, fireman on 82, but I wouldn't say for certain he said his brother, because I don't remember. To wave at some one at least, and he said he come on and throwed No. 3 switch, or one of the switches, and I wouldn't say whether No. 3 or which one, and he said "I throwed one switch and was walking on and stumbled and the engine was a little closer than I expected, and it hit me and caught my leg" or some words like that. I asked him about it then, and asked him all about it, and he said he didn't blame Drawbond at all, that he didn't blame no one but himself, because he was watching to wave at his  
361 brother and wasn't paying attention to what he ought to have been doing. Then I think he said that this switch was open, as well as I remember, one of them any way was open, one of them he come to or had to go through.

Q. Mr. Hall, did you make any examination around or near the point where he fell, afterwards.

A. Yes, sir; I went down there afterwards. I went over this very same ground every hour. I had one of these *twin* clocks, and I guess all of you have seen them. I went around, going to a place and marking numbers where you were at. I had to go over this once every hour, or from twelve o'clock until five-thirty. I went back down there after they got him fixed up, after I had helped to get water and all. Dr. Kelly was there about the time I got him there. I went back and examined the place, and there was a track in by the side of the bridle rail where runs across between the tracks, as if some one had stepped down in there, just a long-ways track, a cross-ways track, right by the side of the bridle rail I call it.

Q. What is the bridle rail?

A. The rail used to fasten the rails together to throw.

Q. To throw the switch?

A. Yes, sir; to throw the switch. Like there was a rail on that side and a rail on this side, and the bridle rail runs to this rail, and that throwed the switch, throwed the needle points that run by the side of the rail.

362 Q. Which way was the toe of the track?

A. The toe of the track was thrown for the lead coming off No. 3.

Q. I am not talking about the railroad track but of the track you saw?

A. Oh, the track was crossing from the opposite side from the switch stand.

Q. Crossing from the opposite side from the switch stand?

A. Yes, sir.

Q. Where was the track with reference to the centre of between the rails?

A. The track was a little closest to the right hand rail.

Q. What was the appearance of the track in reference to whether it was fresh or not?

A. Well, it was fresh, or it seemed to be. It wasn't but a very short time that I was back down there after it happened. I would say it wasn't over an hour and a half until I was back down there.

Q. How was the track in reference to its being distinct or not?

A. Oh, you could see it. I showed it then to the section foreman the next morning, Mr. Harrison, of the North Fork branch section.

Q. That was not the Mr. Harrison who was here today, was it?

A. No, sir; he was section foreman Harrison.

363 Q. Section foreman Harrison?

A. Yes, sir.

Q. How come you to go back and look over the track?

A. I was passing along by there, and did same as anybody who wanted to see sorter how it was. Something was said about, or mentioned about stepping into some place, and I went like any man would who was passing by the place to examine it.

Q. Were you connected with the railroad at all?

A. No, sir; not at all.

Q. Have you been connected with it since?

A. Yes, sir; for very near a month right after that. I think from the 15th or 16th of March to the 10th of April I was employed as a checker.

Q. Have you been connected with it since that time?

A. No, sir! have been working for the Algoma Coal Co. since that time.

Q. For the Algoma Coal & Coke Company?

A. Yes, sir.

Q. As assistant superintendent in the mines?

A. As assistant foreman in the mines.

Q. Oh yes. I wanted to ask you about the lights on the yard. You are acquainted with the lights there connected with the town or village?

A. Yes, I looked after the lights at night. It was my duty to look and see that all of the lights was in place, in the right place; if not in the right place to report them in the morning to be put up in their place.

364 Q. Where was a light close to Mr. Earnest?

A. There is a light on a house not over fifteen or twenty

feet from the place. The switch is a little above and the light is up on a post on the corner of the house with a reflector larger than them, a right smart larger. (Pointing to reflectors on lights in the court house.) The reflector would be something like a two or three gallon bucket, only it was a reflector and bright, on the corner of the house.

Q. That was a reflector for light?

A. Yes, sir; for the light hung over the street or path or road, wide enough to drive a wagon over. It is there, and the switch there a little distance.

Q. Where was the next light?

A. Up next to the store, Hale & Austin's store, another street light, 32 candle power.

Q. An electric light?

A. Yes, sir.

Q. How far was that from where he was hurt?

A. That was on up, I couldn't tell, but 100 feet or 150 feet, something like that. I couldn't say exactly, never did measure it or anything, but it wasn't very far away.

Q. How far was the next light?

A. The next light was an arc light on the opposite side of the railroad. I don't know what candle power it was but a pretty good sized light.

Q. A regular arc light?

365 A. Yes, sir; a great big globe around, and the pieces where the light was on was about that long (Indicating) I think 150 candle power or something like that, or may be more. I don't know the capacity of that light.

Q. Was there or not a light near Hoffman's saloon?

A. Well, there was one right in front of Coffman's saloon.

Q. Had you already mentioned that?

A. No, sir; one on the opposite side of the bridge, close together. About three or four tracks between, three tracks any way. Then Coffman's was like on the left hand side coming east and the other one on the other side.

Q. How far were those lights from the place?

A. Well, as I said about 150 or 200 feet, or 250 feet I expect.

Q. 200 feet or 150 feet?

A. I expect so. I never measured them, but you could see around anywheres near that light.

Q. When you went down there to the track where you saw Earnest what was the value of the light there at that point at that time, when you saw him there?

A. The light was a good light, light enough for anybody to see anything at all.

Q. Could you recognize Earnest by the light?

A. Certainly, yes sir.

Q. Did you see the track there?

A. Yes, sir.

Q. Could you see the railroad track?

366 A. Yes, sir; certainly. There was an arc light not possibly—well just below it on the coaling station, and it was sorter in between three arc lights and these two street lights.

Q. When you went back there to look and make an examination and saw the track in between the ties, did you see it by the aid of the lights from the town?

A. Certainly, because I did not carry any lamps.

Q. That is all.

Cross-examination.

By Mr. MOORE:

Q. How far were those electric lights from where you saw that track?

A. 15 or 20 feet or something like that. I don't know just how far, but I can show you pretty well on the map how the situation is, better than I can tell you.

Q. He was hurt then within fifteen or twenty feet of the electric light?

A. Yes, sir.

Q. Was there anything at all to prevent the engineer from seeing you there at that light, or seeing him when he was run over?

A. He was supposed to be on the left side and the engineer was on the right side.

Q. He was supposed to be?

A. Well, according to the switch stand.

367 Q. As a matter of fact you found him on the right hand side.

A. Yes, sir; he was on the right hand side.

Q. Was there anything at all standing there in the glare of that electric light as you have described it to keep the engineer from seeing him?

A. He would have been a little ways from it to have saw it, to have saw Earnest, that is in the middle of the track; back some ten or twelve feet, or twenty feet maybe.

Q. Suppose he had been up at switch No. 3, or anywhere between switch No. 3 and the coal wharf, couldn't he have seen Earnest?

A. From switch No. 3?

Q. Yes, if he had been between the coal wharf, where the engine started from, and switch No. 3, couldn't he have seen Earnest standing there with that electric light shining on him?

A. According to the steam exhaust he might not.

Q. I am asking you the question, if there was anything to obstruct the view?

A. Nothing more than steam.

Q. Did you see any steam?

A. No, sir; I didn't see any steam, because I wasn't there.

Q. What are you telling about steam for?

A. That is all that could have kept him from seeing him that way, would have been steam.

368 Q. It would have been steam?

A. Yes, sir; you know when you start an engine off the cylinders—but I don't know anything about railroading.

Q. Where did you find out anything about steam business?

A. Well, I have noticed them start any engine that has been standing awhile.

Q. Haven't you heard that steam business discussed since you have come to this court?

A. No, sir.

Q. Did you make a written statement about this case?

A. Yes, sir.

Q. When did you make it?

A. Well, about three or four months ago.

Q. You can write, can you?

A. Yes, sir.

Q. You are a car checker, aren't you?

A. I was at one time.

Q. That requires you to write, doesn't it?

A. Yes, sir.

Q. And the business you are in now requires that you write?

A. Yes, sir.

Q. Did you write that statement you made?

A. No, sir.

Q. Who wrote it?

A. Mr. Haller.

Q. Mr. Haller wrote your statement?

369 A. Yes, sir.

Q. Have you seen your statement since you came here to court?

A. No, sir; I have not.

Q. Have you seen a copy of it?

A. No, sir; have not.

Q. Why didn't you write your statement yourself if you can write?

A. Well, I came out of the mines black and dirty. You know how black a man will be in the mines working and I had come out.

Q. Did you read it over after he wrote it?

A. I listened to him read it, and stood right at him and looked at it.

Q. Did you see him write it?

A. Yes, sir; standing by him.

Q. Did you sign it?

A. Yes, sir.

Q. Did you say anything in that statement about this arc light?

A. No, sir; don't know as I mentioned anything about the arc light.

Q. Did you say anything in that statement about the step or track?

A. I think so.

Q. You are not positive about that?

A. No, sir; I don't recollect. But he asked me about it when he came there, asked me if I knewed him.

370 Q. You went back there and looked by the light of that electric light and saw what you decided was a fresh track down between the bridle and the cross tie?

A. Yes, sir.

Q. How deep down between the bridle and the cross-tie was that track?

A. Not very deep.

Q. Six inches?

A. No, sir; because you see they don't keep but just a small space in there. Just keep cleaned out so it won't freeze up or anything.

Q. At night by the electric light you satisfied yourself and decided there was a fresh track down there between the bridle?

A. Yes, sir.

Q. And that fresh track indicated that the man, whoever he was, made it was going towards the right side, didn't it?

A. Yes, sir; going towards the right side.

Q. So that if Earnest was trying to get over on the right side of the track to wave the engineer ahead that might have been Earnest's track, might it not?

A. Well, all it ever seemed like was as if it was his track.

Q. It seemed like to you it was his track?

A. Yes, sir.

Q. It indicated the track of a man who might have been going to the right side of the track to wave the engineer, didn't it?

371 A. Well, it would seem he was going across to the right side.

Q. You didn't know who made the track?

A. No, sir; I couldn't swear it was his track. I say I seen the track.

Q. Did Earnest ever say in any statement you heard him make that he was working at a switch when he was hurt?

A. No, sir.

Q. In any statement you heard did he ever say he was balking along there and got run over?

A. All the statement I heard him say was that he was watching and aiming to wave at his brother or some one on 82, pusher of 82, and he kinder stumbled or stepped in a hole, was what come him to be there and what come me to look at this place.

Q. In this statement you made awhile ago did you say in that that he was trying to wave at his brother?

A. I think so.

Q. Well, when you made that statement that Mr. Haller wrote the thing was fresher in your mind than it is now, wasn't it?

A. Well, I don't know—well, yes, it ought to have been, three or four months since then. That was some time I think in January or first of February. It was before the last court here.

372 Q. Did Mr. Haller tell you when he was getting that statement from you that anybody else had seen that step or track?

A. No, sir.

Q. But you think then your recollection was fresher about it than it is now?

A. Well, I don't know as it is. I wouldn't say I know it is any



fresher then than now. I never had thought much about it at the time.

Q. So you don't know whether that statement is exactly like the statement you are making here today or not?

A. No, I couldn't say it was the very words, but something very near the same.

Q. That statement is here, isn't it?

A. I couldn't tell you. I haven't saw it from that day to this.

Q. Are you certain that Mr. Earnest mentioned the track when you were talking to him?

A. Certain he mentioned the track?

Q. Yes.

A. Yes, sir; he mentioned the track, about catching his heel on the rail, and that Mr. Drawbond backed the engine off of him to let him loose.

Q. Did Earnest mention the track that was down between the switch and the bridle, down between the bridle and the tie?

A. Oh no, he said he stepped in some kind of hole or  
373 something or other.

Q. Earnest said he stepped into a hole?

A. A hole or something of the kind. I don't know as that is exactly the words, but something about a hole.

Q. You are positive he said he stepped into a hole?

A. Something about a hole.

Q. And fell?

A. He said he stumbled. He didn't say he fell. That the engine was a little closer than he expected.

Q. Therefore he stepped into a hole and fell?

A. No, sir; he said he stepped in a hole and stumbled.

Q. Did he say engine knocked him down or that he fell down?

A. He didn't said. He said he stumbled and by that time the engine was up against him.

Q. You found him on the right side?

A. Yes, sir. Like this is the track here, he was lying right there by the side of the rail, on the right hand side coming east. (Indicating.)

Q. You found him on the side where he ought to be to give signal to the engineer, didn't you?

Judge JACKSON: This witness has not testified anything about the rules.

A. I didn't know anything about the rules.

Q. You and Judge Jackson talking at the same time I didn't hear your answer.

A. I didn't know about the rules. I never railroaded  
374 or had any rules or anything of the kind.

Q. Are you in the employment of the company now?

A. No, sir.

Q. I suppose they are paying your salary while you are down here?

Defendant company, by its attorneys, objects to the question, because the law requires it to pay its witnesses.

The COURT: The appellate court has said that anything tending to show the jury the interest of the witness or his attitude is admissible. I will overrule the objection.

Defendant excepts.

Q. How much is the railway company paying you to come here and testify?

A. Well, they sent me a pass to come here on.

Q. What else?

A. And paid my expenses.

Q. And what else?

A. And what I was getting a day.

Q. How much is that?

A. \$2.50.

Q. Who was the party you told you had seen this track down there between the bridle and the tie?

A. Who was he?

Q. Yes.

A. Well, I think I told Mr. Haller. And I showed it also to Mr. Harrison, section foreman, the next morning. I met  
375 him right at the place as I was going in from work and he was coming to work.

Q. You showed it to Harrison then the next morning?

A. Yes, sir.

Q. Was that the first time you had showed it to any one?

A. Yes, sir.

Q. How come you to show it to Harrison?

A. Well, we was just talking about it. Both of us knew the fellow, and was talking about it. We met right there at the place you might say, and it was as I was going in from work and he was coming to work.

Q. That is all.

(And witness leaves the stand.)

376 R. R. STUART, a witness for defendant being cross-examined when court took a recess for dinner, resumes the stand to have his cross-examination concluded.

By Mr. MOORE:

Q. What business are you in now, Mr. Stuart?

A. Checking.

Q. For the railroad?

A. Yes, sir.

Q. You can write, can you?

A. Yes, sir.

Q. When was it that you made this statement to Mr. Haller that you referred to awhile ago?

A. I don't remember the exact date.

Q. How long ago?

A. It has been several months.

Q. Was it as long as six months ago that you made that statement?

A. Yes, sir.

Q. Well, was it more than six months?

A. I would say that it was, yes sir, but I don't remember the exact date.

Q. Was it as long ago as twelve months?

A. No, it wasn't twelve months ago, or I don't think so.

Q. The accident happened a year ago last February?

377 A. Yes, sir.

Q. How long after the accident was it that you made the statement?

A. I don't know exactly.

Q. Was the statement dated?

A. I don't remember.

Q. You don't remember whether it was dated?

A. No, sir; I suppose it was.

Q. If it was that would show when you made it?

A. Yes, sir; if the statement was dated.

Q. At what place were you when you made it?

A. Vivian.

Q. Did anybody else take part, anybody else present but you and Mr. Haller?

A. Several there in the office, yes sir.

Q. Did anybody else hear the statement or see it written?

A. No, sir; I don't think they did.

Q. That is all.

(And witness leaves the stand.)

378 J. W. McDANIEL, For Defendant.

Examined in chief by Mr. SMITH:

Q. What is your business, Mr. McDaniel?

A. I am an engineer.

Q. On the Norfolk & Western Railway?

A. Yes, sir.

Q. Where do you run?

A. On the Pocahontas division.

Q. Where were you on the night of February 13, 1909, when D. E. Earnest was hurt at North Fork yard?

A. Well, I was going down the hill. I came down to North Fork just a few minutes after he got hurt.

Q. Do you mean that you were going west?

A. Yes, sir; I was going west.

Q. You were going west?

A. Yes, sir.

Q. And you arrived at North Fork a few minutes after he got hurt?

A. Yes, sir.

Q. Did you see him?

A. Yes, sir.

Q. Where did you see him?

A. He was in the yard office, up on the table.

Q. Did you know him?

379 A. Yes, sir.

Q. How long have you known him?

A. Well, I have been knowing him for some time, I reckon about a year or something like that.

Q. Before that?

A. Yes, sir.

Q. State to the jury whether or not you asked him anything about how he got hurt, and if so what he stated in connection with it?

A. Well, when I walked in the office he spoke to me and called me by name. He said "Hello, Bill." I said, "How are you, Dave." He said "I am in bad shape, ain't I?" I said "Yes, you are in pretty bad shape." He also asked me if I thought that would kill him. I told him I thought he would be all right. I asked him how the accident happened. He told me that he was standing down on No. 3 track, as well as I remember, or No. 2, or No. 3, one or other, and I forget which, about the coal wharf, and that he told the engineer he would go on up and line the switches and when he got ready to come on out. That he walked up ahead of the engine and set the switch, and said 82 was passing by about that time, and he was waving at the fireman on pusher of 82, thinking it was his brother, or it was his brother, in other words, and wasn't paying any attention to the engine, and the engine struck him and knocked him down.

Q. Did he make any statement in regard to whose fault it was that the engine struck him?

380 A. Why, I asked him, and he said he didn't blame John for it at all, that the way he got struck he was waving to the fireman and he didn't blame nobody but himself.

Q. He said he didn't blame John for it at all, and what else?

A. No, sir; and he didn't blame any one but himself.

Q. He didn't blame any one but himself?

A. Yes, sir; that he wasn't paying any attention, was waving at the other fireman on the other engine.

Q. Were you ever in pusher service out of North Fork yard?

A. Yes, sir; I was in pusher service for a year.

Q. Well, if an engine is standing down on No. 3 track near the coal wharf and gets ready to move out, and wants to get out, what is the customary way of getting out of there?

A. Well, I always asked my fireman when he had everything on the engine—

Mr. MOORE: I can't understand the witness.

A. We always asked the fireman if he had everything ready that was necessary, and if he said yes I started out. He always walked up ahead of the engine and set the switches.

Q. What was the customary way about signals being given after the start?

A. No signals given at all at these switches; the fireman goes ahead of the engine.

381 Q. How much service have you had out of North Fork yard?

A. I have been running an engine out of North Fork yard about eight years.

Q. I mean in pusher service?

A. I expect in pusher service about two years altogether, maybe a little more than that.

Q. Did you ever have D. E. Earnest or his brother John to fire for you?

A. Yes, sir; Dave fired for me a trip or two, and John fired for me regular. I expect some six or eight months or something like that.

Q. Well, when they fired for you was it done in any other way than you have described?

A. No, sir; the same way.

Q. Suppose, Mr. McDaniel, that you were on the engine and started out on No. 3 track, and you were let out on the lead at No. 3 switch, and then proceeded to No. 2 switch, if No. 2 switch wasn't set right what would happen, if anything, with reference to your engine or the track?

A. Well, wouldn't anything happen at all, no damage at all, except the engine would run through the switch and flop it over, with no damage to engine or switch.

The COURT: I can't hear you?

Q. Repeat that so the judge may hear you.

382 A. No damage to the engine or track at all going through the switch. There would have been no derailment at all. The only thing is the engine would go through the switch and throw it over.

Q. In going through that switch at that point the engine wouldn't have been derailed but throw the switch then?

A. Just through the switch then.

Q. If going west how about that?

A. Well, if going west the engine would be liable to split the switch and get on the ground.

Q. Could it have done that going east?

A. No, sir.

Q. So the engine would have thrown the switch itself if it hadn't been set right for No. 2?

A. Yes, sir.

Q. That is all.

Cross-examination.

By Mr. MOORE:

Q. Then the engine would also have thrown the switch at No. 3, wouldn't it?

A. Yes, sir; the same kind of switch.

Q. And the engine would have thrown the switch at No. 2?

A. Yes, sir; the same kind of switch going out over it.

Q. And the engine would have thrown the switch also at No. 1 if it had been set against you?

383 A. Yes, sir.

Q. What would you send your fireman ahead to throw the switch for at No. 3 if the engine would throw it in going through it?

A. Well, you don't want to run through switches, and always send a fireman to adjust the switches properly.

Q. Why don't you want to run through them?

A. Because you might damage the switches some time, but mostly there is no damage done to them at all. You might accidentally break a lever or something of that kind, but there wouldn't be any derailment to the engine at all.

Q. You would in the regular course of business send your fireman then to open the switch at No. 3. You would send him to do that?

A. I always instructed him when we left the spark track to go and set the switches.

Q. It would be his duty to set No. 3?

A. To set all switches against the engine.

Q. Well, it wouldn't do any harm if you ran through all of the switches?

A. There wouldn't have been any derailing of the engine, I said.

Q. Wouldn't it have sprung the needle points?

A. Why no sir, it wouldn't on those switches on that yard. They are so located, and with a straight lever connected to it, and the engine would just push it over.

384 Q. Isn't it against orders of the superintendent for you to run through switches without setting them?

A. Oh yes, it is against orders.

Q. Then wouldn't you send your fireman on ahead to set your switches so that you wouldn't run through them without their being set?

A. Yes, sir; of course.

Q. You say there is no danger of derailing -our engine?

A. Not in going out over the switch, there wouldn't be.

Q. Isn't there danger of breaking the switch bridle in forcing that lever by forcing the engine through it?

A. Why, sometimes it might accidentally break one, but very seldom on these switches. Of course if it was a main line switch it might break it, they are locked.

Q. Wouldn't you be afraid of being discharged for running your engine over switches without knowing they are in condition? Wouldn't you be afraid to do that?

A. No, sir; I don't think it would be a dischargeable offense.

Q. You wouldn't take the risk in doing it?

A. I wouldn't run through a switch if I could see it and know it was not set.

Q. As a matter of fact wasn't No. 2 switch under those circumstances just as likely to be against the engineer as No. 3.

385 A. Yes, sir.

Q. Suppose then that your fireman had gotten to No. 2 and he found some difficulty in opening No. 2, couldn't adjust it quickly, what kind of signal if any would he give to you?

A. Well, if the switch had been so he couldn't have thrown it he could have waved me down.

Q. Suppose he was there working on it, and examining it, and he could discover that you were running up on him, what kind of signal would he then give?

A. Why, he would get out of the way or give me signal to stop.

Q. Well then, if he gave you signal to stop, and adjusted the switch, what would be his next signal?

A. Why, he would inform me the switch was all right and give me signal to come ahead.

Q. If it wasn't necessary for him to give you any signals after passing No. 3, to proceed, why would he give signal at No. 3?

A. He wouldn't give any signal unless it was against me, or spiked down, or something of the kind, and then he would repair it and wave me ahead.

Q. Well, you say that when your fireman would be piloting you out no signals would be necessary. Why would no signals be necessary when he would be piloting your engine out?

A. Well, we never required any signals on that yard. We  
386 always had an understanding with the fireman to run ahead and set the switches, and the engineer followed him on out.

Q. When you followed him on out would you watch your fireman?

A. Yes, sir; I generally kept my eye on him.

Q. What did you keep your eye on him for?

A. I didn't want to run over top of him, and to see that he got out of the way of the engine.

Q. So when you were following him out you would keep your eye on him.

A. Yes, sir; sorter kept watch.

Q. You didn't want to run over him?

A. No, sir.

Q. And didn't you want to give him time to set the switch and stop your engine if necessary?

A. Oh yes. I always gave him plenty of time to set those switches.

Q. With your eye on him then if you lost sight of him for a distance of four hundred feet would you have stopped or what would you have done?

A. If I had saw the switches was all right I wouldn't have stopped.

Q. Could you see the switches were all right 100 yards, or I mean 100 feet ahead of you in the night time?

A. You could see a right smart piece. There was a head-  
387 light shining on the switch, and also electric lights there so you could see where the switches was, whether lined up properly or not.

Q. Could you see a switch 50 or 70 feet ahead of your engine



with such a light as they had, in the night, and seen the needle points?

A. You couldn't have seen it that far maybe, but I could have seen it in plenty of time to have stopped the engine.

Q. You could have seen the needle points in plenty of time to have stopped your engine if you were looking?

A. Yes, sir.

Q. You couldn't have run over a man at that point if you had been looking?

A. No, sir; not without he was on the opposite side of the engine, or something. I wouldn't have run over him.

Q. If you had seen him you wouldn't have run over him, would you?

A. No, sir.

Q. I want to ask you if you are familiar with the book of rules?

A. Well, I am tolerably familiar, nothing extra.

Q. Does rule 554 have any application to the movement of pusher engines in the yard at North Fork?

A. No, sir; the yard at North Fork is worked under yard limits instead of the other way, inside the yard, and there is no rule in the book of rules for it.

388 Q. Do you understand that to be the railroad rules?

A. Inside of North Fork yard, yes sir.

Q. Is that true in all railroad yards?

A. Why, not in terminal yards, like Bluefield, Williamson and Roanoke.

Q. Well, is that so in all yards like the North Fork yard, that the book of rules has no application?

A. Well, they have yard limits. There are yard limits. They are worked on yard rules. They have a yard board and trains are directed in there between switches.

Q. Isn't North Fork a yard?

A. Yard limits, yes sir, two or three tracks.

Q. Where this accident occurred was in a railroad yard?

A. Yes, sir; two or three storage tracks there.

Q. Well, do you tell me that this Rule 554, where it says engine-men must keep a constant lookout for signals and obstructions, has no application to the North Fork yard?

A. No, sir; not in that yard. The way we operated it there, we always notified the firemen to set the switches and followed him on out.

Q. Weren't you just as likely to find obstructions in the North Fork yard as anywhere else?

A. No, sir.

Q. Does this rule have any application to the movement of trains right out here in the yards in Roanoke city?

A. Yes, sir; it is a rule for trains in these yards, terminal  
389 yards.

Q. But it has no application at North Fork?

A. No, sir; not in all these storage tracks where engines stand.

Q. Did it have any application to switch No. 3 and to No. 2?

A. Switch No. 3 and switch No. 2?

Q. Yes.

A. No, sir; No. 2 and No. 3 were just storage tracks to store cars on.

Q. Do you mean to say that you could run off track No. 3 and over switch No. 2 and on down towards the main railroad track without keeping a constant lookout for signals and obstructions?

A. There was no one to give any signals at all.

Q. Where was the fireman?

A. Well, the fireman was all, and he just set the switches.

Q. What was he out there for?

A. That is all you have to look for, to see that the switches are set by him, and to see where he is at.

Q. Suppose a switch was against you?

A. Stop until it is thrown.

Q. How would he stop you?

A. If he was out there he would give you signal, and if he wasn't out there he wouldn't.

Q. Wouldn't you have to keep a constant lookout for that signal?

390 A. No, sir; not necessary to see him all the time.

Q. Doesn't Rule 525 apply to the North Fork yards, where it says: "It is the business of the yardmaster," such as Mr. Harrison, who has testified here today, "they must be familiar with the rules of the freight service, and the duties of employes connected with the train service, and require the efficient discharge of those duties in their yards." Doesn't that rule apply at North Fork?

A. We were working under the yardmaster's instructions.

Q. Didn't that rule apply and require the enforcement of the company's rules in that yard?

A. Not down there in the yard they didn't. On the main line is all it would apply to; not in on these storage tracks. We go by instructions from the yardmaster there altogether, and work under his rules.

Q. Doesn't that show all the instructions of the yardmaster?

A. Which, the book of rules?

Q. Yes.

A. Well, I guess it does, and he has instructions from the proper authorities.

Q. Suppose the yardmaster were to tell you not to keep a constant lookout for people on that yard, would you obey that kind of an order?

A. No, sir; I wouldn't. And he wouldn't tell me anything  
391 like that.

Q. Why not? If he wouldn't tell you anything like that why doesn't Rule 554 apply, where it says: "It is the duty of the engineer to keep a constant lookout for signals and obstructions"?

A. Well, it would be in the yard limits, and down on those storage tracks I don't think it would be necessary.

Q. Wasn't this in the yard limits?

A. It was in the yard limits, yes.

Q. Where the accident happened was in the yard limits?

A. Yes, sir.

Q. Where the engine started from was in the yard limits?

A. Well, it was on the storage tracks.

Q. Wasn't it in the yard limits?

A. Yes, sir; in the yard limits all right.

Q. Is there anything in your book of rules that describes the duty on yards, that is, that one set of rules apply to one yard, and another set in another yard?

A. No, sir; all the same thing.

Q. Isn't this rule at page 10, the definition of a yard as "A system of tracks within defined limits provided for the making up of trains and storing of cars and other purposes, for which movements not authorized by the time-table or train order may be made subject to the prescribed signals and regulations," clear as to what a yard is?

392 A. Yes, that is a yard.

Q. Didn't that apply to the North Fork yard?

A. Why, North Fork was always called a storage yard, with storage tracks. They never called it a yard at all.

Q. Well it is true, as stated in this definition, that it is a place for storage cars and other purposes?

A. Yes.

Q. Wasn't North Fork that?

A. Yes, sir.

Q. And North Fork, you tell us, was a yard. Doesn't this rule apply where it says "they must be subject to the prescribed signals and regulations"? Take the rule book and look at it and see if it does not apply to the North Fork yard?

A. I understand it all right.

Q. Doesn't it apply to North Fork?

A. I guess it does, as far as that is concerned, but we never went by them instructions at North Fork yard.

Q. Why did you go by instructions on the North Fork yard that were different from the rules and different from your instructions at other places?

A. Nothing but a few engines there, and the yardmaster instructed them what to do. A few cars stored on the yard, no shifting, no yard engine or anything of the kind.

Q. Rule 522 says "Yardmasters must require the efficient discharge of those duties in their yards." Have you any explanation to make of that?

393 A. The yardmaster's jurisdiction was from Coaldale to Vivian yard on the main line. It wasn't only North Fork yard, but through the whole coal field.

Q. He had charge of the North Fork yard?

A. Certainly, he had charge of the North Fork yard, and anything wanted done he had done.

Q. Now, if you had special rules that were to be used in the North Fork yard that were different from these in the book of rules, please tell us where those rules are?

A. I called them rules, they are all the same, as far as that is concerned in the yard. But what them rules are represented to be in the yard, is where you have to look out for yard engines and things-like that, shifting and making up trains, and such as that. It was just storage tracks down there, and the yardmaster had authority.

Q. You find something in the book of rules that explains that this book of rules does not apply to North Fork yard, and point it out to us.

A. It applies to North Fork yard, as far as that is concerned, but we never did go by these rules on that yard.

Q. Did you make an exception in the case of the North Fork yard?

A. No, sir.

Q. You didn't go by the rules in the North Fork yard, you say?

394 A. No, sir; didn't go through there looking out expecting to find some one shifting. It was right there in plain view, and only a couple of hundred yards to come out.

Q. Do these rules apply to Bluefield yard?

A. Yes, sir. Does apply.

Q. Does these rules apply to Flat Top yard?

A. That is a storage yard, but you would have to go through there on the main-line looking out.

Q. These rules would apply in every form of yard where it says "keep a constant lookout for signals and obstructions"?

A. Yes, sir; on the main line you would have to go through there looking out.

Q. Well, don't they apply at North Fork?

A. Anything standing on the main line you have to look out for.

Q. In Rule 829 we have this provision: "When hand signals are necessary they must be given from such point and in such a way that there can be no misunderstanding on the part of engineemen or trainmen as to the signals or as to the train or engine for which they are given." Please tell us where that applies, whether to the North Fork yard?

A. Any signals?

Q. I will ask the stenographer to read the question. (Which is done.)

A. Why, if they are doing any shifting on the yard if you give signals they must be so they can be seen, and any crew  
395 doing any shifting there.

Q. Then the rule applies to shifting and doesn't apply to running an engine out to carry a train on the main line?

A. Why certainly it applies to the same thing, but it was never necessary for the fireman always to cross over and throw switches and give signals at every switch.

Q. Suppose it is necessary, as the rule implies, for him to cross over. Then should he do that in the North Fork yard, or do it in some other way?

A. Why, yes, if it was necessary he should do it there as well as anywhere else.

Q. This was within the yard limits at North Fork I think you have told us?

A. Yes.

Q. Then if it was within the yard limits at North Fork I will ask you if this rule applies, 102-A:

"When within yard limits trains must run with great care and under the control of enginemen."

Does that apply in the North Fork yards?

A. Yes, sir; out on the main line it does, through the main track.

Q. Does it apply to an engine coming off of a switch to go on to the main line?

A. Yes, if he saw anything standing out there. We always come up to the main line and stop in the clear, and then get our instructions from the yardmaster. He directs the movement after that and set- the switches.

396 Q. Would that apply to an engine when it was starting down there at the coal wharf to go off No. 3, then on the lead, and on the main line? Would that rule apply to that engine or not, while on the North Fork yard?

A. Coming out on the main line?

Q. Yes.

A. Why yes, if it was coming up there. I couldn't run right on through it.

Q. Could you have come out of there twenty miles an hour?

A. Oh no.

Q. Could you come out of there without knowing whether your switches were right?

A. No, sir; you could see the switches. You always had the fireman ahead to set the switches.

Q. Why is it you have to run your engine with great care and keep under control while coming out of there?

A. All engines always come out of there under control.

Q. Don't that rule apply to North Fork yard?

A. Oh yes sir, I guess the rule applies to North Fork yard all right enough.

Q. What do you mean by telling this jury, as you have been telling them for the last half hour, that they had different rules for North Fork yard?

A. I said the rules was all the same, but the yard limits for North Fork yard was what we worked by. There is no terminal at all there. What I mean is they have a yard board, specifying  
397 so many feet that trains are directed in there.

Q. I will ask you then if this rule applies to the North Fork yard, in moving an engine off the switch over the lead and on to the main line:

"106. In all cases of doubt or uncertainty the safe course must be taken and no risks run."

Now, does that rule apply to the North Fork yard, as I have read it?

A. Yes, sir; that applies to all of them.

Q. Well then, if these rules do apply to the North Fork yard,

how is the practice in the North Fork yard any different from that in other yards?

A. Well, as I told you before, there was nothing but some engines and cars stored there in the yard. No yard engines there at all that done any shifting. We always operated there by calling the yardmaster by phone and he instructing us what to do. We always told the fireman to set the switches and we would go out.

Q. Suppose you were out on a little spur track that ran off to a lumber camp, wouldn't you have to look out for signals and things of that kind just the same as if you were an engineer on the Norfolk & Western Railway?

A. Oh yes, you would have to see that switches were properly set to get off a spur or anything else.

Q. I will ask you if this rule applies to North Fork yard:

397½

*Definition of Trains.*

An engine, or more than one engine coupled, with or without cars, displaying markers.

A. Apply to North Fork yard?

Q. Yes.

A. Yes, that is a train. It doesn't apply to North Fork yard any more than anywhere else.

Q. But does it apply to North Fork?

A. I exactly don't understand the question, what you mean by that.

Q. It doesn't matter what I mean; I want your answer. Here is the question—

A. Why certainly I don't know what you are getting at.

Q. It doesn't matter whether you know what I am getting at; I want the truth about it. I am asking you if this definition of a train, which reads as follows, applies to the North Fork yard:

"An engine, or more than one engine coupled, with or without cars, displaying markers."

Now the question is, does that apply to the North Fork yard?

A. No, that doesn't have anything to say about the North Fork yard. That is a rule specifying what is a train. It doesn't say anything about a yard.

Q. Well, if a train within the definition given there were on the North Fork yard would that rule apply to it or not?

A. Why yes, if that man was standing in those yard limits, you would have to lookout for him.

398 Q. Mr. McDaniel, if you were an engineer with an engine standing down there at the coal wharf, and your engine was ready to run, and displaying markers, and you had a fireman, and would send him, out to open the switches, then please state whether or not your engine, with that equipment, would be a train within the meaning of the definition I have read?

A. Why yes, it would be a train, representing a train.

Q. Then would it be a train on the North Fork yard?

A. Yes, sir; it would be a train on the North Fork yard.

Q. Then does that rule apply to trains on the North Fork yard?

A. It would apply to trains looking out for him or what? It applies to a train looking out for him, of course. If they come around and see him standing there they would have to stop.

Q. Did you make a written statement in this case of what your evidence would be?

A. Yes, sir—no, sir.

Q. You never have made one?

A. No, sir.

Q. That is all.

Re-examination.

By Mr. SMITH:

Q. Mr. Moore has asked you about an engine or more than one engine coupled, with or without cars, displaying markers, 399 being a train. What do you mean by markers?

A. Well, markers is two green flags by day placed on the rear of the tank, or two red lamps by night.

Q. What does that indicate?

A. That indicates the rear of the train.

Q. To any other train people seeing that what does that indicate to them?

A. It indicates to them that that is the rear of your train.

Q. Then they have to take the same notice of that they would of any train?

A. Why yes. You see you put that up to specify your rear. You put your white flags on the front of the engine and green flags on the rear. It represents your train. If that is on a light engine it represents a train.

Q. With that sort of equipment on a light engine that represents that that engine is to be treated as a train?

A. Yes, sir; classed the same thing as a train.

Q. And other trains must take the same notice of it that they would of any other train?

A. Yes, sir; of any other train.

Q. What are those markers put there for, for people on that engine or for people on other trains?

A. For people on other trains.

Q. It is put there for people on other trains?

A. Yes, sir; to represent the rear, you know.

400 Q. Mr. McDaniel, Mr. Moore has asked you questions about a man on the track in front of an engine. Suppose a man came on the track within six or eight feet of your engine, coming on from the left side, and your engine was proceeding slowly, would you see him?

A. Well, I wouldn't see him at all when he ran right straight across. You couldn't see him when he came on within a short distance ahead of the engine.

Q. You couldn't see him if he came on within a short distance ahead of the engine?



A. No, sir; not within six or eight feet.

Q. Would the engine strike him without your seeing him?

A. Yes, sir; it would.

Q. Mr. McDaniel, I will read you Rule 102-A:

"When within yard limits trains must run with great care and under control of the engineman. Trains and engines have the right to move within yard limits by direction of the yardmaster."

Mr. Moore did not read the latter paragraph of this rule. Does the last part of it apply just as well as the first part?

A. Yes, sir.

(And witness leaves the stand.)

CHARLES E. COX— for Defendant.

401 Examined in chief by Mr. SMITH:

Q. Mr. Cox, what do you do?

A. I am roundhouse foreman.

Q. Roundhouse foreman?

A. Yes, sir.

Q. Do you remember when D. E. Earnest was in the hospital at Bluefield?

A. Yes, sir; I remember when he was in there, but don't know the exact date.

Q. Well, did you have any business with Mr. Earnest while he was in the hospital at Bluefield, and if so what was it?

A. Why, during the time he was in the hospital at Bluefield it was railroad pay-day, which was on the 25th, and Mr. Earnest had sent word that he would like to have his money. I taken the pay rolls and also his check to Mr. Earnest while he was in the hospital at Bluefield.

Q. What day did you take the check?

A. Just after the 25th, but I can't say whether it was the 26th or 27th.

Q. What month was that, the month he was hurt?

A. Yes, sir.

402 Q. February, was it?

A. Yes, sir; it was in February.

Q. Did you see Mr. Earnest?

A. Yes, sir.

Q. Had the operation been performed on him?

A. Yes, sir; had been performed and he was able to sit up a little bit.

Q. He was able to sit up a little bit?

A. Yes, sir.

Q. State to the jury if you had a conversation with Mr. Earnest, and if he told you how the accident occurred by which he was hurt, and if so what it was?

A. When I went in and got to talking to Mr. Earnest I asked him how it was he allowed this engine to catch him. He said that he had gone up in front of the engine to throw some switches, and

at the same time there was an eastbound train pulling up the main line, and said that he was waving at the fireman on this eastbound train, which I believe was 82. He said that while he was waving at this fireman he decided that the engineer or his engineer thought he was waving him ahead, and the engineer on his engine came on up and the engine run over him. I asked him who was to blame, or who he thought was to blame, and he said he could not blame any one only himself. He said he decided it was his own carelessness; if he had been watching he wouldn't have gotten run over. That is about all the conversation I had with him.

Q. And that was on the 26th or 27th of February?

403 A. Yes, sir; just after pay-day, which was on the 25th.

Q. Take the witness.

Cross-examination.

By Mr. MOORE:

Q. Did you write down that statement?

A. No, sir.

Q. Then you didn't write it down?

A. No, sir.

Q. Did you report it to any one?

A. No, sir; I didn't report it to any one.

Q. How did they ever find out he had made it to you then?

A. How did who find it out?

Q. You say you didn't report that statement to any one?

A. I didn't until after it was——

Mr. SMITH: Go ahead and tell all about it.

A. I didn't until just recently, since this trial has been going on.

Q. Did you make a written statement about it then?

A. No, sir; I did not.

Q. To whom did you report it?

A. Well, there was a couple of men witnesses here, by the name of D. M. Jackson and Vivian Gordon. They came back to Kimball after passes, and I wrote them passes, and while they were  
404 there I was asking them about the trial, and they was telling me about it, and I told them what Mr. Earnest told me at Bluefield. Them's the only ones I told.

Q. Then it has been eighteen months ago since this thing happened, and you didn't tell any one it happened until since this court began?

A. No, sir; it wasn't necessary.

Q. And then you told some parties who had been summoned here as witnesses for the railroad, didn't you?

A. Yes, sir.

Q. Didn't Mr. Haller go to see you about it, or did he sent for you to come here?

A. Sent for me to come here.

Q. Did he take a written statement from you after you got here?

A. No, sir.

Q. When did you get here?

A. On No. 4 this morning.

Q. Who have you talked with—and I do not refer now to any lawyers. You have a perfect right to talk to lawyers, but leaving out the lawyers who have you talked with since you got here.

Mr. SMITH: Do you mean to say he didn't have a right to talk to Mr. Haller?

Mr. MOORE: I haven't anything at all to say about Mr. Haller.

Judge JACKSON: Well, I will say that this is a free country enjoying free speech, and he has a right to talk to anybody he wishes to talk to.

405 Q. Without reference to any attorneys employed in this case who have you talked with about it since you got here?

A. Well, Mr. Haller is about the only one.

Q. Did he meet you at the train?

A. No, sir.

Q. Mr. Haller has asked you what you knew about it?

A. Yes, sir.

Q. And you have gone over the whole case with Mr. Haller?

A. Yes, sir.

Q. Did Mr. Haller tell you what any of the other witnesses had sworn to?

A. No, sir.

Q. Was any one else present when you were talking with this young man Earnest?

A. No, sir; think not.

Q. Do you know whether it was this man (pointing to plaintiff, D. E. Earnest) or this man (pointing to his brother John W. Earnest) that you were talking to?

A. That one there, D. E. Earnest.

Q. Where was the trained nurse?

A. She wasn't in the room. I can't tell you where she was at.

Q. You went up there to pay him off?

A. Yes, sir.

Q. That is all.

(And witness leaves the stand.)

406 VIVIAN F. GORDON—for Defendant.

Examined in chief by Judge JACKSON:

Q. Mr. Gordon, where do you live?

A. I live at West Vivian now, Kimball.

Q. Are you in the employment of the Norfolk & Western Railway Company?

A. Yes, sir.

Q. How long have you been in the employment of that company?

A. Five years on the 28th of this coming September.

Q. Have you during that time been engaged in the service of the company as fireman?

A. Yes, sir; all that time.

Q. Have you during that time been engaged in the pusher service in North Fork yard?

A. Yes, sir.

Q. How long?

A. Somewhere near two years.

Q. When did your service begin and when did it end in that pusher service at North Fork, as nearly as you can remember?

A. I had been firing ten or eleven months when I went to work at North Fork on pusher, something like that.

407 Q. Do you know the conditions of that yard there at North Fork?

A. Yes, sir.

Q. Supposing, Mr. Gordon, an engine is on the yard at North Fork, and the engineer desires to move the engine out on to the main line, and you are acting as his fireman in assisting him in moving it out, state to the court and jury the usage and custom and practice of doing the work there in that yard under those circumstances.

A. Do you mean how you got out of there?

Q. Yes, sir.

A. Why, they have an understanding whenever they get ready to go, if the engineer is ready he would ask the fireman if he was ready, and if he was he would get down, and if I was coupled to another engine I would uncouple them and then go and line up the switches, up to the main switch.

Q. I will ask you to state to the court and jury whether it was the custom at any time during the time you were engaged in that service for the engineer to move only after signals were given at each switch?

The plaintiff, by his attorneys, objects to the question because leading.

Objection sustained.

Q. During the time that you were there was the work ever done in any other way than that which you have indicated as being the custom and usage?

408 A. In no other way, sir.

Q. Did you ever know of its being done in any other way?

A. No, sir; I never did.

Q. Now, Mr. Gordon, what length of time did it take for the fireman to line up the switches down through that yard?

A. Well, it wouldn't take him but just ordinary walking along. He wouldn't have to stop hardly at a switch.

Q. Why not?

A. Because they are easy to throw, easy to handle, and all he would have to do is to reach down and turn it over and go on. It wouldn't delay him scarcely any time hardly ever to stop.

Q. Well, if the switch was thrown to run right would he have to stop at all?

A. No, sir; if the switch was set right for him to get out it wouldn't be necessary for him to stop at all.

Q. How was it in that respect, was the switch generally right for him to go out or otherwise?

A. Well, it was more than likely, most of the times the switch would bet set for the lead.

Q. I will ask you to state what the condition of that yard was as to lights, along the line of that switch.

A. Well, along about these switches up there there was very good light. There was arc lights from the town, and then there was electric lights down through in several different places  
409 on the yard, and one I suppose in probably eight or ten yards of this switch.

Q. State whether or not there was any difficulty in observing where the switches, whether lined up or not?

A. None whatever, sir.

Q. Was there a path by the side of the track along down to the main yard?

A. Yes, sir; a path that the public traveled along on the outside where this switch stands.

Q. What kind of path is it, a well beaten path or otherwise?

A. Yes, sir; a very well beaten path, lots of people traveled it.

Q. Who travels it, you say lots of people do, are there many people around there?

A. Yes, sir; people going to and from work, and people living up on the hill, and just the public in general.

Q. Is there any trouble in locating the lever to the switch?

A. No, sir.

Q. Something has been said about the lever to that particular switch where this party got hurt. Do you know whether that lever rests anywhere there?

A. Yes, it lays right in the pathway, right in the clean place right on the outside of the rail.

Q. Is it difficult to see it?

A. No, sir; not any whatever at that place, especially there.

410 Q. During the time of your service there how often did you assist the engineer out along those switches?

A. Why, every time we went out.

Q. Every time you went out?

A. That is, unless the yardmaster would come down for us sometimes in a hurry, and he would go out and probably line the switches up as he came down for us to go out, but that was seldom ever done.

Q. Did you assist him often during the night in lining up the switches?

A. Yes, sir; more at night I reckon than in the day, or as much.

Q. Well, how did the engineer proceed with his engine?

A. Well, after we got ready to leave?

Q. Yes.

A. Why, whenever we got ready to start he would tell me to go ahead with it, and I would tell him I was going on to line up the switches, and he would be ready, and I would get down off the engine and line up the switches to the main switch, and he would follow me out.

Q. Was there any danger whatever to the fireman in this method of doing the work? I mean there on that yard. If so, I would be glad if you would state to the jury what the danger consisted in?

A. None in the world that I could see. I never had a bit of trouble, and never came anywheres near getting hurt there  
411 anywhere that I know of. I don't remember of having any narrow escapes. You just watch your business of course. You could not—

Q. You could not go to sleep?

A. No, sir; you couldn't do that, but go along and line the switches up if they were not right the way you wanted to go, and keep on moving until you got to the main track.

Q. That is all.

Cross-examination.

By Mr. MOORE:

Q. When you started out ahead of your engine to pilot it out at night did you take any light with you?

A. Yes, sir; the most of the time I did.

Q. Was that in the North Fork yard?

A. Yes, sir.

Q. What would you take a light with you in the North Fork yard for?

A. Why, to assist me in seeing better. To have it with me generally in starting out down from the lower end, where it wasn't as light as it was up there; to see how to get along. There was generally obstructions or blocks laying along where we got the engine from, down at the lower end.

Q. So that all you had the use of a light was to look for blocks and obstructions?

412 A. Not so much. To get us out, for other purposes if you needed it, but you didn't need it after you passed the tipple; didn't need a light so bad then.

Q. You didn't need it so bad. Did you need it at all?

A. You really didn't need it at all, had plenty of light without it.

Q. Could you think of any need at all for a light except to look for blocks and obstructions along the railroad track?

A. No, sir.

Q. You can't think of any use at all you would put a light to?

A. No, sir.

Q. On a dark night, I will say?

A. Well, unless the arc light or something had gone out you wouldn't need it, not on the upper end there.

Q. You wouldn't?

A. No, sir; with the lights burning you wouldn't need a torch there.

Q. Can you imagine then what a man would start out from the engine down there for with a big bright torch in the night to go on up to that track? Was that an unnecessary thing for him to?

A. No, sir; it was all right to do it, to have it in your hand if you wanted it. I say at all times I didn't take a light.

413 Q. It is all right to have it, but he didn't need it for anything except to see obstructions and blocks along the track?

A. You might need it down at No. 3 switch. It isn't as light there as up farther.

Q. If you needed it at No. 3 switch what would you need it for?

A. You might need it there for—I wouldn't need it to throw the switch by because you can see it very plain, you can see that by walking along, if you had no light you could see the position of the switch.

Q. You wouldn't need it to see the switch by but what you would need it for is what?

A. More to see if there was anything in your way or where you were walking.

Q. What would you need it at No. 3 for to see where you were walking, what was in the way of your walking on No. 3?

A. As I told you there might be some obstructions or something, or there might be blocks or something laying along down there.

Q. Do you mean laying along down between the rails or outside of the rails?

A. Between the tracks, between 3 and 4.

Q. Then there might be blocks along down there between 3 and 4, but you don't mean between the rails?

A. No, sir; I don't mean on the track.

414 Q. They kept blocks out then from between the rails?

A. Yes, sir.

Q. That was perfectly plain and nice I suppose?

A. Yes, sir; from between the tracks.

Q. Those blocks and obstructions were between the tracks and not between the rails?

A. Yes, sir; down there in between I have seen it.

Q. As a matter of fact you have seen blocks and obstructions between the tracks a good many times?

A. Yes, sir; at the lower end, not in the upper end.

Q. Farther up from the tippie you go the fewer obstructions there would be?

A. Yes, sir.

Q. And the only need a man would have for a lamp or big bright torch would be to see the blocks and obstructions?

A. Yes, sir.

Q. Why, suppose he had to give signal there that night, that he would find one of the rails detached, or the train would run off the track, how would he manage to give signal there that night without a torch?

A. Well, I had overlooked that part of it. That would be one good thing of having a torch, in case something was on the track, or there was a broken rail, or something, then your torch would come in all right.

Q. Then you can have two things you think of that he would need a torch for, one to find obstructions along the track, so he



wouldn't fall down, and another one was if he found a  
415 broken rail to give signal for. Can you think of anything  
else but a broken rail and obstructions that he would need  
a torch for?

A. No, sir.

Q. Suppose he would get to No. 3 switch and he could not turn  
that lever at all, would he have any use then for his torch, at eleven  
o'clock at night, a dark night?

A. Well, just as I said awhile ago, a broken rail or anything wrong  
with the switch would then need a light.

Q. Suppose then something were wrong with the switch what  
would he do with the torch?

A. Signal the engineer to stop.

Q. What would that signal be?

A. Do you mean how given?

Q. Yes.

A. Given across, that way. (Indicating.)

Q. After he had given that signal and the engine had stopped and  
he had gotten the switch fixed, or the broken rail repaired, as the  
case might be, what kind of signal would he give then?

A. Raised and lowered the light.

Q. What would that mean to the engineer?

A. To come ahead.

Q. Well then, he would come on down to the next switch, and  
suppose he finds something wrong there, what kind of signal does  
he give there?

A. The same signal as he did before at No. 3.

416 Q. Give the signal to stop, would he?

A. Yes, sir; if there was anything wrong with the switch,  
or if there was anything defective in any way.

Q. Wouldn't it be the business of the engineer to be far enough  
back behind him and watching out for signals so he could see him  
when he gave the signal to stop?

A. Well, he could go on ahead of him, probably ten or fifteen  
yards ahead of the engine, and there would be plenty of time then  
because he doesn't balk along at more than three miles an hour I  
don't guess.

Q. Fifteen yards would be forty-five feet?

A. Yes, sir.

Q. If he was running along 45 feet behind the fireman he would  
have plenty of time to stop if he was watching him when he gave  
the signal to stop?

A. Yes, sir.

Q. Then if the engineer had his eye on the track, with the fire-  
man 45 feet ahead of the engine, he could see him if he gave the  
danger signal, couldn't he?

A. Yes, sir; if there wasn't too much steam escaping from the  
cylinders.

Q. Who told you about steam?

A. Well, I have seen enough while coming out of there to know.

Q. You were not there that night, were you?

A. Well, I have seen them coming out on pushers, and they have to open the cylinder cocks when they start.

417. Q. If he gave the signal to stop and then got the switch fixed what kind of signal would he give?

A. Raised and lowered.

Q. If you don't know of any need he would have for a torch in fixing up these switches why should he bother to carry one?

A. Well, I have told you what he might use it for.

Q. And if you don't know of any need he would have for a party fixing up these switches when engineer would get to switch No. 3 in coming out off track No. 3 why doesn't the engineer then just pick up his fireman and carry him up to the other end of the yard, and then let him get off and fix the switch at the main line, without his going all the way up through the yard?

A. Well, the firemen generally walk on ahead probably.

Q. If there is nothing for him to do what makes him walk on ahead?

A. To see that the switches are set right, and to be ready to throw the main line switch if they are ready to go out.

Q. You say those switches then are not always set right?

A. They are more apt to be set for the back lead than they are for any of those tracks.

Q. But they are frequently the other way, that is against the engineer, are they?

A. Sometimes they might be, yes sir.

418. Q. Does the same rule apply to the North Fork yard that applies over the railroad generally in the yards?

A. Do you mean at this place where you got the engines out there?

Q. Yes.

A. No, sir.

Q. If you were getting an engine out of the Bluefield yard would a different rule apply?

A. Oh, you are now talking about terminal yards. Yes sir, the rule would apply in getting engines out of that place, in all terminal yards that way, where there are switches.

Q. Where there are switches. Was this within the yard limits at North Fork?

A. Yes, sir.

Q. I will ask you if this rule would apply:

"102. Within yard limits trains must run with great care and under control of the engineman."

Does that rule apply in the North Fork yard?

A. That doesn't apply in that place there. It is in the yard limits, but these tracks were where engines were stored away when they are kept there to come out. When you get on the main line then that rule would apply.

Q. I think you have got the wrong idea of what a yard is. Do you know what the rules say constitutes a yard?

A. I don't know what you are exactly getting at.

419 Q. Well, it doesn't concern you what I am getting at.

A. Well, I mean as to the question you are wanting to know. I don't know how you want me to explain the question. You say about yards, and I don't exactly catch that question.

Q. We are through with the witness.

Re-examination.

By Judge JACKSON:

Q. You have said something about steam escaping from the cylinder cocks of the engine that has been standing. Was that the usual thing in bringing an engine out of that yard that had been standing on the yard?

A. Yes, sir.

Q. Is there any reason why that should not be well known to the fireman?

A. Yes, sir; those instructions to that effect from the Motive Power Department are that you shall open the cylinder cocks when you start out, to drain your cylinders.

Q. What is the effect of that?

A. That drains the steam or water out. The condensed steam comes out and it kinder scatters or spreads itself in the atmosphere.

Q. Mr. Moore has asked you several questions about where there is a broken switch, or a broken rail, and the necessity arises for  
420 signals in cases of that kind to be given by the fireman to the engineer to prevent his coming on. I will ask you to state whether or not under those conditions there is any danger to the fireman?

A. No, sir; none whatever. All he would have to do would be to step off the track if the engine was anywhere close to him and signal to stop. There is no danger at all.

Q. If you had to cross the track then to do that wouldn't the train be in plain view?

A. Why certainly, yes sir.

Q. Would you stand in front of the engine to give signal?

A. No, sir; not if it was close to me. Of course if you were a good distance from it you could stand there. If it was close to you you could step off to the side of the track.

Q. Is or not the fireman supposed to watch those things?

A. Yes, sir.

Q. And is there anything in the discharge of his duties that renders it difficult for him to observe those things, and if there is state what it is to the court and jury.

A. Do you mean in observing these switches?

Q. And observing the approach of the engine?

A. I didn't exactly catch that question, Judge.

Q. I was asking you some questions about where signals are given, and you said that if he had to cross the track to give  
421 signal that there was nothing to prevent the fireman from seeing the train. Is there anything in the discharge of his

duty as fireman in lining up the switches that prevents him from knowing the fact that the train is approaching?

A. No, sir; none whatever. Nothing in the world.

Q. Is there anything that makes it difficult for him to protect himself?

A. No, sir; not a thing.

Q. Is the fireman supposed, or is it the duty of the fireman, to do anything for his own safety and protection as he goes down there?

A. Yes, sir—

Mr. MOORE: That is a question of law and we object.

Q. Stand aside.

(And witness leaves the stand.)

422 D. M. JACKSON—For Defendant.

Examination in chief by Judge JACKSON:

Q. Where do you live?

A. I live at Kimball at the present time.

Q. Are you in the employment of the Norfolk & Western Railway now?

A. Yes, sir.

Q. How long have you been in the employment of the company?

A. Well, I went to firing on the road in March 1905.

Q. Have you been firing ever since?

A. No, sir; I was promoted to engineer since.

Q. You are an engineman now?

A. No, sir; I have been scaled back since that time to firing.

Q. Well, have you had any experience as fireman in pusher service in North Fork yard?

A. Yes, sir.

Q. To what extent did you render service in that capacity in North Fork yard, and for what length of time?

A. Well, I couldn't tell exactly. I was in the pusher service at different times.

Q. On the North Fork yard?

423 A. Yes, sir; at North Fork.

Q. Do you know conditions in the North Fork yard, Mr. Jackson?

A. Yes, sir; I know the condition of that yard very well. I did the most of my firing at the North Fork.

Q. Well, I will ask you now to state to the jury what the condition of that yard is as to lights, whether it is well lighted or otherwise, and if so state the source of the light there?

A. As to what kind of lights there are?

Q. Yes.

A. Well, they have electric lights on the east end of the yard at North Fork. There are electric lights up that give very good light to North Fork yard.

Q. Very good light?

A. Yes, sir; they have very good light there.

Q. Was there any trouble, is there any trouble, or has been there any trouble in observing the switches with the light at night in that yard?

A. Do you mean, what kind of effect does the light have on those switches?

Q. Whether there is any difficulty in seeing those switches.

A. No, sir; no difficulty in seeing the switch by the light given there at North Fork yard.

Q. Do you know whether that switch, or rather where that switch is at the point where plaintiff was hurt?

A. Well, the No. 2 switch, or what number was this in the 424 yard that Earnest was hurt at?

Q. No. 2 switch.

A. Yes, I know where No. 2 switch is.

Q. I will ask you to state whether or not the situation there is well lighted?

A. Yes, sir.

Q. Approaching that switch how far can you see at night from the lights that are there, whether it is set right or not.

A. Well, you can see that switch by the lights—Do you mean, would I have a light or just by the lights on the yard at North Fork?

Q. Well, with just the lights there, and where you have a light.

A. Well, you could see that switch 50 or 75 feet, all of that distance.

Q. Supposing, Mr. Jackson, an engineer wants to move his engine out from North Fork yard, and the engine is ready to move, and his fireman is there, and they start to move that engine out. I wish you would describe to the jury the process.

A. Do you mean the action between him and the engineman?

Q. Yes, the custom and the practice of moving the engine out.

A. Well, the custom we had of moving the engines, when the engineer and fireman were called to a pusher engine they 425 were the pusher crew. We would know, or each man would ask, are you ready? The other man would ask was he ready, and when we got ready we got out this way always: The fireman would go ahead and line the switches, and the engineman would follow slowly out of the yard to the main track switch.

Q. What signals, if any, were given on the way by the fireman?

A. By the fireman to the engineman?

Q. Yes.

A. Well, I never did give any signals. I always set the switches and he would follow up. It was understood between us that he was coming on, and that I was going to set the switches and pilot him out to the main track and off the yard.

Q. Was that custom or practice in effect in that yard as the way of doing business?

A. I never did practice it or see it practiced on the yard at North Fork.

Q. Never did practice what?

A. Throwing switches and giving signal after throwing switches.

The way I got out, and the way I have seen others get out, is to throw the switch and pilot the man out, and it would be understood that he knew you were going to throw the switch, and he would follow slowly to the main track switch.

Q. Do you know of its being done in any other way?

A. No, sir.

426 Q. Was it an easy or a difficult matter for the fireman to line up those switches?

A. Yes, sir; it was very easy to line up those switches, because they was in good condition, and it was right along on the left hand side of the track coming out of the yard, and it was all on one side plum- to the main line track switch. Right out through the switches on the North Fork yard to come to the main track switch at the main line, there is no trouble throwing the switches whatever.

Q. What length of time did it take to discover whether a switch was right or to put it right if it was not right?

A. Why, it didn't take any time at all, you might say, just walk on passing by a switch and keep throwing them, and you could tell whether they was right by the position of the lever on the switch, at the side.

Q. Is it difficult or not to discover the position of the lever?

A. No, sir.

Q. Do you know of any reason at all that made it difficult, if so I would like for you to tell what that is?

A. Well, there is no reason why there should be any difficulty in throwing the switches, because they was in good condition, and the lever-throw to those switches was at least an inch and a half in diameter, and the switch is easily found.

427 Q. Does or not the fireman know about the distance between the switches anywhere?

A. Well, you mean how far apart those switches are?

Q. Yes.

A. Yes, sir; the fireman ought to be able to know how far it is from one switch to the other, that is, about the distance.

Q. Who were your engineers during the time you were engaged in pusher service on this yard.

A. I fired with Mr. McDaniel, and Mr. Eugene Wright, and Mr. Akin, and Mr. Marshall who is not now in the service. He resigned and is away from here now, and I don't know where he is.

Q. Did you fire any for Mr. Drawbond on that yard?

A. Yes, sir; I fired on other runs for him, but never fired pusher for Mr. Drawbond on the North Fork yard.

Q. That is all.

Cross-examination.

By Mr. MOORE:

Q. Mr. Jackson, supposing then that an engine should be piloted out of the yard in the way you have described that they do pilot them out, how far ahead of the engine would the engineer permit the fireman to go?

A. Well, the engineer never has told me how far ahead  
428 to go. I always, when I was piloting an engine out, just had an understanding that we was ready and had all the equipment we was needing in the way of tools. Then I would tell him I would throw the switches so he would know I had gone ahead to throw the switches, and I would just throw the switches right and go right on to the main track switch, and we would never enter the main line track until we found out what we would push and get instructions from the yardmaster, provided we had not already called up from the register and already knew what we had to push.

Q. Well then, supposing you were on No. 3 track, No. 3 switch I believe they call it, down at the coal wharf. You would start on ahead of the engine and would first throw No. 3, wouldn't you?

A. I would throw any track we might be standing on. You understand we would throw that switch provided it was wrong for the engine to make the movement over.

Q. You would examine that and if necessary throw it first?

A. If we needed it to be thrown. We could tell by its position where it was whether it needed throwing or not.

Q. How could you tell?

A. Could tell from the position the lever was in, the position the needle point was in and the lever of the switch.

429 Q. You would examine the needle points to tell the position the switch was in?

A. Well, we could tell without any difficulty at all, we could tell by walking over the switch.

Q. If you had to throw it you would throw No. 3 to begin with?

A. Just throw the switch and proceed on out of the switch on to the lead.

Q. Don't anticipate my questions but answer what I ask you. You would first examine the needle points at No. 3, and if you found the switch against the engineer you would reach over and get hold of the needle point, or rather the handle-bar and throw the switch?

A. I would always be over on the other side of the switch, and if the switch was against the engine I would throw it and proceed.

Q. Wouldn't you stop there and give signal?

A. No, sir; I never did.

Q. It would be just understood that you were going to keep on through and throw the switches?

A. That is the way it was always understood.

Q. How far ought the engineer to stay behind you?

A. He should only follow slowly. I couldn't state how far he was going to stay behind. I always stayed ahead of the engine after throwing these switches.

Q. Would it be the business of the engineer to watch to see that he wasn't running up too close on you?

430 A. I don't know as he could see me. It was owing to how fast I was going and how far ahead of the engine I would be.



Q. If you had a torch in your hand and it was during the night time there would be no trouble seeing you?

A. It would be owing to how far I was on that side of the engine.

Q. He would drive ahead without seeing you any more until you got up to the other switch?

A. He would always come slowly, and the fireman set those switches and would always stay out of the way of the engine. In throwing those switches it was always understood between the engineer and the fireman and the fireman proceeded right along throwing the switches to the main line.

Q. How would the engineer know you had thrown the switches if he didn't know what you were doing by signal or otherwise?

A. It was understood by the engineer we was ready to come out, and that the fireman would throw the switches and come out. When it was necessary to stop the engineer I would give him signal by crossing over to where he could see the signal.

Q. If you didn't have time to throw the switch and he was pretty close to you, running three or four miles an hour, how would you stop him, or how would you step over on the engineer's side and give signal?

431 A. If I thought it safe to do so I could do it, or I could halloo at him.

Q. You could halloo at him?

A. Yes, sir.

Q. Under those circumstances you would halloo instead of giving signal?

A. No, if more convenient to cross over I would do so, but rather than put myself in danger I would halloo.

Q. If another train was passing he would run by you and not hear you halloo?

A. I couldn't tell about another train. Might not be another train passing.

Q. Have you any code of signals by hallooing?

A. No, sir; I haven't any code by hallooing any more than if he would hear me halloo that would draw his attention of course.

Q. You have told us all about the understandings you had with some of the engineers you worked with. Did your understandings you had with your engineers change the rules of the company?

A. Well, the understanding we had with the engineers was for a man to make ready, and we always made ready you know to get out. You didn't have so very much time to make ready to get out, and always each man found out if the other fellow was ready. The engineer and fireman would find out and have an understanding that they was ready to go, and the fireman would proceed throwing switches, and the engineer follow very slowly behind him until he got to the main line.

432 Q. What would he follow slowly behind him for?

A. So the man would throw the switches.

Q. Was that the only reason why he would follow slowly?

A. And then the engineer would follow slowly to give the cylinders time to drain the water from them.

Q. What is he supposed to be looking at when he is following slowly behind him?

A. Well, he is just supposed to be following, and coming right along knowing that you are setting the switches, and following him right on out to the main track switch.

Q. How does he manage to follow him, does he overlook the track or does he ever look at him to follow him?

A. Well, sometimes you may never see him any more until he gets out there plum- to the main track.

Q. How would he know that the man was ahead of him fixing the switches if he didn't see him?

A. It is understood between him and the other man that that man is gone ahead to throw the switches.

Q. Suppose the fireman then would get his foot caught in the frog, or anything of that kind, is the engineer supposed to drive ahead without looking for him and run right over him, with his foot fast in the frog?

A. Well, of course if a man would happen to an accident of that kind I couldn't say just how that would happen, of course.

It never happened to me.

433 Q. You have been asked all kinds of supposed cases. I am asking if the engineer in the discharge of his duties would drive 800 feet from the coal wharf on through all those switches without looking at his fireman, and in all probability run over his fireman with his foot in a frog? I ask you if that is the duty of the engineer to do that?

A. Well, as far as the 800 feet is concerned, I don't know the distance. I don't know whether it is 800 feet or not.

Q. I am only supposing a case. It is 400 feet from the coal wharf to switch No. 2, and it is a great deal farther on to the main track. Now then I am asking if you mean to tell this jury that it is the duty of an engineer to run not only for that 400 feet, but also for a great long distance beyond that without looking at fireman to see whether an accident had happened to him or whether he had fallen on the track, or whether his foot was fast in a frog, or anything of that kind. Do you tell the jury that it is the duty of an engineer to do that under those circumstances?

Defendant objects.

Objection overruled.

Defendant excepts.

A. Well, as far as the duty of the engineer in regard to that matter is concerned, why the engineer whenever he would have an understanding that the fireman would set the switches he would expect that man to be out of his way setting the switches,

434 because there is no use of any man getting on the track to throw those switches, because they are right in the path along that track, and in good view, nothing to obstruct the view of these switches, and you can see these switches plum- through to the main track switch, and you don't have to get on the track to throw any switch at all.

Q. Now, then, you can see clear on through from where that engine started to the main track?

A. You can get right in the path going along there and there is nothing to hinder you from seeing the position of the switches, by way of the needle points or the set of the levers.

Q. And all he has to do is to run his engine on down at a slow rate of speed, all the way through, without looking at the track or looking where his fireman is. You say that is his duty?

A. It is not necessary to see the fireman all the way up there.

Q. Didn't you say awhile ago he had to go across the track sometimes to give signal?

A. You may have to give signal, and might be far enough ahead to give signal without having to cross over.

Q. Well, what is the use of giving signal if the engineer doesn't have to look for it?

A. Not necessary to give signal going through that yard unless something happens making it necessary to wave him down.

435 Q. But if the engineer is up there in the cab understanding that he is throwing the switches and not looking out for him, what is the use of giving signals?

A. Well, I never did practice giving any signals when going out of that yard, none whatever.

Q. Well, you may have been negligent in what you did. I will ask you about this Rule 554, if it isn't the duty of the engineer "To keep a constant lookout for signals and obstructions"?

A. Well, it is the duty of the engineer to keep a constant lookout for signals and obstructions, but where they are not required to give any signals I don't see why he should be required to look for signals?

Q. Yes. Now, Mr. Jackson, I have just found by the blue print already in evidence (Defendant's Exhibit B), that it is 625 feet from where that engine started down through those various switches until it reaches the switch that would turn it across the main track. Do you tell the jury that an engineer would be performing his duty if he would drive down through all those switches and cross that yard, for 625 feet, without looking to see where his fireman was, or without looking for signals that his fireman might give?

A. Well, he is going down through the yard now, or coming out through the yard.

Q. Going out just the way you have been describing it all the time.

436 A. Well, it was understood between the engineer and the fireman he was gone ahead and setting the switches.

Q. Then the engineer wouldn't have to look out at all until he got down to the main line?

A. Not necessary that he should be hanging out or looking for signals that way. This fellow had gone to throw the switches, and if anything should happen he should give signal, and I don't see why he shouldn't give signal.

Q. If the engineer wasn't looking for a signal what is the use of giving it?

A. Well, he wasn't required to give any signals going out through that yard. It was understood he was gone ahead and setting the switches, and of course if anything would be wrong that he had to give signal he could very easily, if attending to his duty, and he is supposed to be familiar with the rules and instructions himself, he is supposed to know how to give signals. The rules don't require signals to be given on the yard.

Q. Isn't it the engineer's duty to look out for signals?

A. I don't see any duty of the fireman to give signals. I don't know of any necessity of his giving signal there, when he has gone ahead to line up the track.

Q. Is it the duty of the engineer to look out for signals as he goes down through the yard?

A. As he goes from #3 switch to main line?

437 Q. Is it his duty to lookout for trouble on the track, or lookout for signals from his switchman?

A. There is no rule in the book covering the giving of signals in a yard at intermediate switches.

Q. Is it the duty of the engineer in driving out over those switches for 625 feet to drive right along without looking out to see where his fireman is or without looking for signals his fireman might give?

A. As far as the rules of giving signals in an intermediate yard are concerned, I found no rule in the book that requires any signals in an intermediate yard in regard to setting all those switches and crossing over.

Q. The witness does not seem disposed to answer the questions I ask.

The COURT: That is not the question counsel asked you. Mr. Moore asked you whether or not it was the duty of the engineer to be on the lookout while driving out of that yard?

WITNESS: Well, if the engineer while driving out of that yard does as they always do, opens his cylinder cocks in order to give an escapement of steam and water that had gathered in those cylinders, you understand, the condensation, that probably would obstruct the view in that case. But they always have an understanding when each party is ready to make the move, and the fireman is always to go ahead and set the switches, and is not required to give any signals in the yard.

The COURT: I suppose witness has made the best answer he can make.

438 Mr. MOORE, continuing cross-examination:

Q. Now, your honor, I will ask the stenographer to repeat your question to the witness. (Which is read.) You are hesitating as if you didn't understand the question. I will explain it to you: Isn't it the duty of the engineer to keep an eye on the track and his hand on the throttle to avoid danger as he goes down through that yard?

Judge JACKSON: Danger to who, or what kind of danger?

The COURT: I think the question plain enough.

A. It is the duty of the engineer, as far as signals are concerned, on main tracks, as far as I understand the rule. But I have never seen anything in the rules covering switches in an intermediate yard, where he has a man to set the switches and who is piloting him to the main line.

Q. Your idea of the engineer's duty is, that he can drive 625 feet through the yards at North Fork, run over his fireman, run over citizens, run his engine over the track, and do anything else, just provided that he and the fireman have an understanding before the fireman left that the fireman was going on and set the switches. Is that your idea of his duty?

The defendant company, by its attorneys, object to the question as immaterial and irrelevant.

The COURT: I think it argumentative and will sustain the objection for that reason.

439 Q. Now, Mr. Jackson, suppose the fireman and the engineer had made an agreement before the engine started from the coal wharf that the fireman would go on through and set the switches, your idea is that the engineer wouldn't have to look at the track under those conditions?

A. How is that question.

Q. I will ask the stenographer to repeat it. (Which is done.)

A. I don't think it necessary.

Q. Suppose a citizen, or an employé of the railroad, by accident or otherwise, got on the track and got his foot fast in the track, you think that the engineer ought not to lookout for those people?

The defendant company, by its attorneys, objects to the question because argumentative.

Objection sustained.

Q. That is all.

(And witness leaves the stand.)

440 RAY M. GARDNER, for Defendant.

Examined in chief by Mr. SMITH:

Q. Mr. Gardner, what business are you in?

A. Locomotive engineer.

Q. On what road?

A. Norfolk & Western.

Q. On what division?

A. Pocahontas division.

Q. How long have you been an engineer?

A. It will be eight years on the 8th of August 1910.

Q. Have you ever been engaged in pusher service at the North Fork yard?

A. Yes, sir.

Q. Do you know what is the custom there of coming out of the yard, say if you were down on No. 3 track and you wanted to get

out through the yard to the main line, with reference to the fireman going ahead and piloting the engine out?

A. Yes, sir.

Q. State to the jury what that custom is.

A. The custom is to say that you are ready to the fireman, and he will proceed to No. 3 switch, and signal you ahead if No. 3 switch is lined up for you, to come out of No. 3. Then he proceeds on to the main line switch. If there is nothing due he throws the main line switch and crosses over and signals you ahead.

Q. Is there any custom that requires any signaling after you start until you get to the main line switch?

A. No, sir.

Q. How many years were you engaged in pusher service at the North Fork yard?

A. Six months.

Q. Was that the custom there during the time you were engaged in that work?

A. Yes, sir.

Q. Did either one of the Earnest boys fire for you in pusher service there?

A. Yes, sir; D. E. Earnest.

Q. Did he proceed ahead in the manner which you have described, was that the way he proceeded when he did it?

A. That is the way he was supposed to do it, yes sir.

Q. What is the custom or instructions in reference to cylinder cocks being open when engines are started, if there is any custom or instructions, in reference to that I mean, state it to the jury.

A. There are no instructions as to that.

Q. What is customary if an engine has been standing and ready for service, steamed up?

A. That just depends if the engine is too full of water so that it will work water through the cylinder cocks. If not keep them closed.

442 Q. If she works water through the cylinder cocks what should you do?

A. Open them up.

Q. Is that required when an engine is so full of water that she will work water through the cylinder cocks?

A. That is not required, but in justice to the company's material it should be done.

Q. What may happen if that isn't done?

A. Liable to knock out the cylinder head.

Q. Take the witness.

Cross-examination.

By Mr. MOORE:

Q. You say a signal would be given at No. 3?

A. Yes, sir.

Q. What would he give that signal at No. 3 for?

A. To know that the switch was lined up for you to come out of No. 3.

Q. Then when you got down to No. 2 and found that it wasn't lined up what would the fireman do?

A. He would be supposed to line it up.

Q. Then what would he do?

A. Go on to the next one.

Q. What would the engineer be doing?

A. He would be supposed to be coming out.

Q. Would he be watching his fireman?

443 A. Well, not necessarily so.

Q. Not necessary to watch his fireman?

A. No, sir.

Q. How would he know the fireman was going ahead and lining up the switches unless he watched him?

A. He told him he would go ahead when he went there to line up No. 3.

Q. He told him to — ahead. How do you know he did?

A. Well, he told me by his own mouth.

Q. Who told you?

A. The fireman.

Q. What fireman are you talking about?

A. About the fireman that is going ahead of the engine.

Q. What was his name?

A. I don't know what his name should have been.

Q. What! You don't know what his name was?

A. No, sir.

Q. What fireman did you ever work with that way?

A. Sir?

Q. What fireman did you ever work with that way?

A. Talk with that way?

Q. Yes.

A. Every fireman I told I was ready to go out, he went ahead when he was ready to pilot the engine out of there.

Q. Oh, you mean when he left the coal wharf?

444 A. When we were ready to start out of No. 3 switch.

Q. Supposing you were down at the coal wharf when you got ready to start, and you and the fireman would have an agreement that he would go through and open the switches——

A. Certainly if we were ready to go.

Q. Then you wouldn't pay any more attention to the fireman after that?

A. I would want to see whether No. 3 switch was throwed, yes sir, would want a signal from him.

Q. What is the use of his giving you signal, or what is the use of your giving any attention to No. 3 switch if he is going through to open them all on out?

A. Well, as a general thing No. 3 switch was set wrong, you know.

Q. Might not No. 2 also be set wrong?

A. Well, yes, but we never was required to get signal from No. 2 switch.



Q. Who required that you get a signal from No. 3 switch?

A. Well, we wanted to see whether No. 3 was set before proceeding through it.

Q. Suppose No. 2 wasn't right, wouldn't you have to see that that was right before proceeding through it?

A. It would be supposed he would see that it was right or give signal that it was set for danger, against him, and then he would wave him down.

Q. Why wouldn't the same supposition be true of No. 3?

445 A. Because the rule doesn't require it.

Q. What rule are you talking about?

A. The rule in regard to switches.

Q. Where do you get that rule from?

A. In the rule book.

Q. What place in the rule book?

A. I think it is 104.

Q. I now show you a copy of the rule book and ask you to point it out.

A. 104.

Q. Now, what was it you said 104 applied to?

A. To main line switches.

Q. Was this on the main line?

A. No, sir.

Q. So Rule 104 applies to main line switches?

A. I think so, yes sir.

Q. Rule 104 is this:

"104. Switches must be left in proper position after having been used. Conductors are responsible for the position of switches used by them and their trainmen except where switch tenders are stationed. A switch must not be left open for a following train unless in charge of a trainman of said train."

You say that applies to main line tracks?

A. I think it would, yes sir.

Q. If that applies to main line tracks, and I think you are right about it, how would it apply to this switch track and this lead coming out to the main track?

A. Those there are intermediate switches.

446 Q. Then this rule would have no application to it, would it?

A. Not in case of signal.

Q. The rule that you referred me to doesn't say anything about signals at all?

A. It is supposed to be left set for the main line, isn't it?

Q. But I am talking about No. 2 switch. Why was it necessary to have a signal at No. 3 if it was not necessary to have one at No. 2?

A. Track No. 2 was always supposed to be set for the lead.

Q. But suppose an engine had dropped in on No. 2 to clear? It wouldn't be set for the lead then would it?

A. In a place beyond that No. 2 switch if it is set you can see it.

Q. Suppose an engine or cars had been dropped in on No. 2 switch, it wouldn't be set to the lead then, would it?

A. No, sir.

Q. Then if set for the lead the fireman would be supposed to set it?

A. Suppose to do so, yes sir.

Q. Why was it not as necessary to have a signal at No. 2 as at No. 3?

A. Well, that was never the custom.

Q. That never was the custom?

447 A. No, sir.

Q. Would you run right on over No. 2 then, and run over your fireman while he was trying to set No. 2 switch because it was the custom not to wait for signal? Would you do that?

A. Would I run over my fireman?

Q. If he was at No. 2 working at it or examining it would you run on over him because it wasn't the custom to wait for signal?

A. You can't run over him at No. 2.

Q. Why couldn't you run over him at No. 2?

A. Because the lever is on the outside of the path, clear there, and the lever being in the path he would be there to throw the switch.

Q. And the lever is also under the pilot of a passing engine?

A. No, sir; I don't think so. I think that switch will clear.

Q. As a matter of fact you don't know whether the lever is or not, do you, or where it is?

A. Yes, sir.

Q. Well, doesn't that same condition exist at No. 3 switch?

A. No, sir.

Q. What is the difference at No. 3 from No. 2?

A. There is a rock wall that comes down there where No. 3 switch is, and at No. 4 also.

448 Q. Do you tell the jury it was the duty of the engineer to look out for his fireman if he was going ahead piloting him out of that yard, or that it wasn't the duty of the engineer to do it?

A. It was the duty of the engineer to get signal at No. 3 switch, and at the main line switch. But it wasn't the duty of the engineer to get a signal at No. 2 or at No. 1.

Q. Do you tell the jury that it was the duty of the engineer to lookout for his fireman when he was piloting him out of that yard, or that it wasn't the duty of the engineer to look out for his fireman when he was piloting him out of the yard?

A. In one sense of the word it was his duty to look out for him.

Q. Why was it his duty to lookout for him?

A. Because he is supposed to keep a lookout ahead at all times.

Q. Why was he supposed to keep a lookout ahead at all times?

A. Well, whatever man would give him a signal or something to stop and if he wouldn't have been looking out would he have seen it?

Q. Suppose he has occasion of some other kind for signalling you about it, would he have seen that?

A. He was supposed to, yes sir.

Q. What would a man be keeping a lookout all the time for?

449 A. Because the rule requires him to keep a lookout?

Q. The rules of the company do?

A. Yes, sir.

Q. Require him to keep a lookout for what?

A. Going ahead.

Q. What is the matter ahead that he is looking for?

A. The company requires that of him.

Q. What is he supposed to be looking for?

A. Looking for danger ahead.

Q. What else besides danger?

A. Well, any obstruction on the track I would suppose.

Q. Anything else besides an obstruction?

A. (No answer)

Q. Anything else besides an obstruction?

A. I wouldn't know what it would be.

Q. How about a man on the track?

A. Wouldn't that be an obstruction?

Q. Do you think so?

A. I would think so.

Q. Would your fireman be an obstruction on the track?

A. I would think so.

Q. It certainly wasn't his business to look out for the fireman, was it?

A. That was his business, to look out for obstructions, but if the fireman he knew was going ahead through the switches——

450 Q. Well then I will ask you this then: It would be the engineer's duty then to keep a constant lookout for instructions and signals, would it not?

A. Yes, sir.

Q. You are talking about North Fork?

A. Yes, that is the subject.

Q. What you have been testifying to here applies to North Fork yard, does it?

A. Yes, sir.

Q. You are positive of that?

A. Yes, sir.

Q. Well then, it seems like this Rule 554 is with you, under the duty of engineers;

"554. \* \* \* To keep a constant lookout for signals and obstructions"

So you are talking about that very rule, are you?

A. If that is what the rule says I was talking about that.

Q. Then it is the duty of the engineer to keep a constant lookout on the North Fork yard for obstructions and signals?

A. It doesn't specify that, no not North Fork yard, or any other yard.

Q. But it does apply to the North Fork yard?

A. It applies all over the system, yes sir.

Q. We are through with witness.

(And witness leaves the stand.)

451 W. S. TRACE, for defendant.

Examined in chief by Mr. WINGFIELD:

Q. Mr. Trace, what is your occupation?

A. Timekeeper for the Norfolk & Western Railway.

Q. In what department?

A. The Motive Power Department.

Q. Do reports of time made, record of the time made by the various firemen along the line come to you?

A. Yes, sir.

Q. Do you keep a record of the time made by firemen?

A. Yes, sir.

Q. And the amount of money which they earn?

A. Yes, sir.

Q. Have you with you a record of the amounts earned by D. E. Earnest during 1908, 1908 and so on?

A. Yes, sir.

Q. You also have it for 1907?

A. We have here with us now 1908 and 1909, but will have shortly from August 1907.

Q. I will ask you to get your records. I will first ask you if you made up this statement from your records?

A. I made it from the pay rolls.

Mr. MOORE: Let me ask a few preliminary questions with a view to objecting. Have you the records of Mr. Earnest's whole time for the years 1905, 1906 and 1907?

452 Mr. WINGFIELD: We do not propose to encumber the record by introducing any time back of August 1907.

Mr. MOORE: If you will bring here a statement showing Mr. Earnest's salary made during the good years as well as the bad we will not object to the use of the statement this witness has compiled, otherwise we will ask that you proceed in the regular way.

The COURT: I think the witness may state the result of his examination rather than take up the time of this court for him to again go through thirty bound volumes of pay rolls.

Plaintiff excepts.

Mr. WINGFIELD, resuming examination-in-chief:

Q. Take this paper and state to the court and jury what Mr. D. E. Earnest made each month, beginning with February 1909 and going back as far as you have the records here with you in the court room to show.

A. All right, they are as follows:

February, 1909	.....	\$35.53
January	" .....	85.86
December, 1908	.....	83.04
November	" .....	62.72

October	"	41.97
September	"	3.36
August	"	Nothing
July	"	9.00

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June,	1908	\$28.08
May	"	29.82
April	"	25.92
March	"	Nothing
February	"	5.79
January	"	30.78

This is all I have just now but the others going back to August 1907 are on the way.

The COURT: Have you averaged those wages?

WITNESS: No, sir.

Q. The other records are now here. Now commence with December 1907, where you left off, and go back as far as your records in court will show:

A. All right, with what I have here I can go back to and including August 1907, viz:

December,	1907	\$87.17
November	"	79.44
October	"	90.03
September	"	84.79
August	"	91.11

Q. That is all.

Cross-examination.

By Mr. MOORE:

Q. Have you also in your possession or under your control records showing what Mr. D. E. Earnest earned for the months of January to and including July 1907, which you have not given us?

454 A. Yes, sir.

Q. Will you please give us those figures.

A. We can give you those, but haven't got them here. I will have to get them from the office.

Q. They are in another book?

A. They are in another book, yes sir.

Q. Can't you send for that book?

A. Well, I don't believe I could now. They have all gone away from the office by this time. It is now 5:30 p. m. and they have gone. I will have them for you by tomorrow morning.

Q. We would like to have D. E. Earnest's salary back to 1905, just two more years than you have given. It will be no trouble to you to give that?

A. No, we can get that by tomorrow morning ten o'clock I guess.

The COURT: Can't you have those figures here by nine o'clock?

WITNESS: I will go down tonight then and get them and by so doing can do so.

Q. How do you account for the fact that the salary earned during some months of 1908 was so small?

A. For the reason that he didn't work a full month.

Q. Was there any reason why your men were not working a full month, full time, during the months of 1908?

A. I don't know anything about that.

Q. Do you know, being in charge of those pay rolls, that your men worked on shorter time and a great many of them you  
455 had to lay off entirely during the year 1908?

A. Well, the men in 1908 didn't make as good time as during 1907.

Q. Why not?

A. I suppose on account of the depression all over the country.

Q. That is all except the request I have made for D. E. Earnest's wages back to and including 1905.

(And witness leaves the stand.)

456 C. D. HALLER—For Defendant.

Examined in chief by Mr. WINGFIELD:

Q. You are employed by the Norfolk & Western Railway?

A. Yes, sir.

Q. In the Claim Department?

A. Yes, sir.

Q. And your business takes you all over the line of the company, does it not?

A. Yes, sir.

Q. And makes you acquainted with the various men employed in the various branches of the service?

A. Yes, sir.

Q. Now I want to ask you just to tell what men you know that you have come in contact with engaged in the service of the railroad company who have lost one or more legs and are still doing active work.

A. In what capacity?

Q. Enginemen, firemen, watchmen, switchmen, in any capacity, just state their names and the capacities in which they are now working.

A. Well, sir, from my own recollection I have just been thinking about enginemen with one leg. Mr. Zack Spencer is an engine-  
457 man on the Norfolk Division, between Roanoke and Petersburg, in the passenger service, and one of our best engineers. He has a two-inch stub, the balance an artificial leg. A man by the name of R. B. Taylor is a yard engineer and does yard shifting on the Lynchburg yard with a yard engine. His leg is off between the knee and the hip. C. E. Spencer is a freight engineer on the Norfolk Division. He has an artificial leg. W. R. Pamplin is a yard engineer and is on the Shenandoah division, located at Winston-

Salem, North Carolina, doing yard service, shifting on the yards with a yard engine. C. E. Koontz is a yard engineer on the Radford Division. W. W. Brinkley was a fireman and jumped off #42 at Wytheville and got a leg cut off, and was promoted to an engine in yard service in Roanoke yard. Those are my own recollection. I can give you some others from the records. We have men working all over the road who have artificial limbs, in different capacities.

Q. Have you the records with you?

A. No, sir; I haven't the records with me. I have a memo. of some enginemen on the Scioto Division—

The plaintiff, by his counsel, objects to witness testifying about anything as to which he has no personal knowledge.

Q. That is all.

Cross-examination:

By Mr. MOORE:

Q. All these men you have named were engineers at the  
458 time they were hurt?

A. Except Brinkley.

Q. And your railroad company tried to find some way to keep them in their places, is that true, of these old engineers?

A. The railroad company does all it can to assist its men.

Q. And these men you have mentioned were kept in their places?

A. Yes, sir.

Q. Now, will you give us the number of men, engineers, who have had their legs cut off, or the number of firemen who have had their legs cut off, and lost their places? How many of those do you know of?

Defendant objects.

Objection overruled.

Defendant excepts.

A. I know of a great many firemen who have lost their legs in the service of the company that did not go ahead firing but who were given other positions learning telegraphy, given switching positions, running stationary engines, given charge of pumping stations, and doing other work.

Q. Then you do know of a great many of them that had their legs cut off that did lose their positions?

A. Any of them that wanted to go to work and who would work, who would ask for a job, the company would generally try to take care of them.

459 Q. This young man said he asked for a job and waited until the next December after he was hurt. How long does your company wait until they give him a job?

A. Mr. Moore, this young man would have had a job. He was told they would give him a job.

Q. You didn't tell him, did you?

A. No, I didn't tell him.

Q. Well, don't tell what somebody else told him.



Mr. SMITH: We have a letter from this young man in August, not in December, in which he referred the company to his lawyers in Washington. You are wrong in your statement about plaintiff waiting until December.

Q. How many have failed to get jobs at all and who had to go back home to be taken care of?

A. Those who refused to take jobs or do anything and brought suit against the company.

Q. Those fellows who wouldn't sign a release or things of that kind, and who tried to get their rights, you didn't give them anything?

A. Those who were refused jobs, or a great many of them brought suit—Or, I will say, that those who sued didn't get jobs because they went to the courts as their recourse.

Q. So when a man went to the courts, or I will say went to see a lawyer about his case, you punished him by not giving him a job?

A. No sir; a great many people have gone to lawyers and we have given them jobs through their lawyers.

460 Q. Well, would the Norfolk & Western Railway give this young man a job now, with one leg gone?

A. I am not authorized by the management to say at this time. They would have done it.

Q. Give him a job as an engineer?

A. I don't know, sir, what job they would have given him.

Q. You don't know what job would have been given him?

A. No, sir.

Q. You don't know anything about that?

A. No, sir; I am not authorized to say at this time that they would give him any job of any kind.

Q. Did this young man ever refuse any job that the Norfolk & Western Railway had offered him?

A. He didn't give them a chance to offer him. He was told that they would give him a job—

Q. If you told him that all right.

A. I didn't tell him.

Q. The man who told him will have to testify to that then.

A. The man who told him is here.

Q. Very well, sir, that is all.

Mr. SMITH: Here is a letter from your client, dated August 23, 1909. We now tender the letter if plaintiff admits he wrote it.

Mr. MOORE: All right.

"DEFENDANT'S EXHIBIT C."

SEVEN MILE FORD, VA., *August 23, 1909.*

Mr. W. S. Battle.

461 DEAR SIR: In reply to your letter of July 24th, asking me to sign a release: I wish to notify you that I have placed the matter in the hands of my attorneys, Pack, Hinton & Pack, of Wash-

ington, D. C., to whom I have forwarded the release together with all correspondence, and who have advised me not to release the company, and any further communications in this matter please address to them.

Very truly yours,

D. E. EARNEST.

Defendant also offers the copy of letter to which above was a reply.

"DEFENDANT'S EXHIBIT D."

Norfolk & Western Railway Company.

ROANOKE, VA., July 24, 1909.

Mr. D. E. Earnest, Seven Mile Ford, Va.

DEAR SIR: Yours July 23rd. Before paying this bill I should be glad to have you release the company so that my file may be closed. I am handing you herewith a release which you should read, sign and return to me.

Yours truly,

W. S. BATTLE, JR.,  
General Claim Agent.

MR. MOORE: What bill does that letter refer to?

MR. SMITH: Here is the bill, and we will introduce it.

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"DEFENDANT'S EXHIBIT E."

W. S. Battle, Jr., General Claim Agent N. & W. Ry., to J. E. Hanger, Washington, D. C.

AUGUST 5, 1909.

April 28. To one leg for D. E. Earnest.....\$100.00

Court adjourned until tomorrow morning nine o'clock.

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WEDNESDAY, June 29, 1910.

Morning Session.

Court met at nine o'clock pursuant to adjournment on yesterday.

The defendant company not having concluded its evidence continued to offer same as follows:

W. S. TRACE—A witness introduced by defendant on yesterday, examined in chief and partly cross-examined, resumes stand for further cross-examination.

By MR. MOORE:

Q. When you left the witness stand on yesterday you were giving the salary of D. E. Earnest, and had gotten back as far as August 1907. What was his salary for July 1907?

A. \$18.54.

Q. June?

A. \$90.03.

Q. May?

A. \$93.12.

Q. April?

A. \$90.42.

Q. March.

A. \$75.12.

Q. February.

464 A. \$78.36.

Q. January.

A. \$66.61.

Q. December 1906.

A. \$60.54.

Q. November.

A. \$76.46.

Q. October.

A. \$73.75.

Q. September.

A. \$91.38.

Q. August.

A. B\$16.17.

Q. July.

A. \$80.67.

Q. June.

A. \$64.93.

Q. May?

A. \$64.61.

Q. April.

A. \$56.91.

Q. March.

A. \$5.03.

Q. February.

A. \$54.88.

Q. January.

A. \$71.56.

465 Q. December 1905.

A. \$59.89.

Q. November.

A. \$35.61.

Q. October.

A. \$34.19.

Q. September.

A. \$64.59.

Q. August.

A. \$60.70.

Q. July.

A. \$64.29.

Q. June?

A. \$39.38.

Q. May.

A. He didn't go to work until June 19, 1905.

Q. So then in June 1905 he didn't make a whole month?

A. No, sir; he entered the service June 19, 1905.

Q. He worked then a third of a month?

A. Yes, sir.

Q. On the same basis then his salary for June, if working the whole month, would have been approximately \$90.00?

A. No, sir; it would have been about \$65.00.

Q. Going to work on June 19th and making \$39.38?

A. Yes, sir.

466 Q. If he made that working from the 19th wouldn't he have made three times if working the whole month?

A. His average for July, August, and September was \$62.50, for those three months, and I infer from that his salary for June wouldn't have been more than it was for July, August and September.

Q. What is the average for July, August and September?

A. \$62.50.

Q. June 1905 is when he began?

A. Yes, sir; June 19th.

Q. And he worked 11 days and made \$39.00?

A. \$39.38.

Q. And worked how many days?

A. I haven't got the number of days he worked.

Q. That is all.

(And witness leaves the stand.)

467 EUGENE WRIGHT—For Defendant.

Examined in chief by Mr. SMITH:

Q. What is your name?

A. Eugene Wright.

Q. What is your business, Mr. Wright?

A. Running an engine.

Q. For what company?

A. Norfolk & Western.

Q. How long have you been in the service of the Norfolk & Western as an engineer?

A. 8 years and a half.

Q. Have you ever been engaged in pusher service at the North Fork yard, out of that yard?

A. I worked pusher out of North Fork six years.

Q. Did you ever have Mr. John Earnest as your fireman when you were working pusher out of North Fork yard?

A. Yes, sir.

Q. Mr. Wright, are you acquainted with the mode of procedure when you undertake to take a pusher engine out of the yard there and carry it out on the main line for the purpose of engaging in the pusher service?

A. How is that Mr. Smith?

Q. Are you acquainted with the customary way of taking  
468 an engine out of the North Fork yard when you start out,  
say from track No. 3, to go out on the main line for the  
purpose of engaging in the pusher service?

A. Yes, sir; why we generally——

Q. I asked you if you knew the customary way of doing it?

A. Yes, sir.

Q. Well now, state to the jury what was the customary way of  
doing it?

A. Why, the fireman would get the engine ready, and sometimes  
he would get his part ready before I would, and if it was after dark  
he would take his torch sometimes and sometimes he wouldn't, and  
say, I will go on up and set the switches and you come up. I would  
go on up when I got ready, to the main line and stop if I didn't know  
that overdue trains was all gone.

Q. Well, were any signals given at intermediate switches when  
the firemen passed those switches, or anything of that sort?

A. No, sir; sometimes he would be up at the main line and I  
wouldn't see him at all. Sometimes if he was where he could see me  
and I could see his light he would give me signal.

Q. Mr. Wright, it has been testified here by Mr. John Earnest  
that he was a fireman under you in the pusher service out of North

469 Fork yard, and that you never passed a switch going out of  
that yard without he gave you signal to do so. I will ask  
you if that is true or not true.

The plaintiff, by his attorneys, objects to the question because  
leading and also because reciting what some other witness has said  
when the rule of separating the witness- was invoked before opening  
statements of counsel were made. The proper way to examine the  
witness is to throw him on his own independent recollection of what  
did happen.

The COURT: I do not see how that may be done in a case of this  
kind. The other witness having made certain statements which the  
defendant wishes to meet directly I do not see how it may be done  
other than by calling his attention to the point sought to meet.

Plaintiff excepts.

A. No, sir; he didn't give me signal at every intermediate switch.  
Sometimes he would go on up and go to the house and get his  
bucket, and I wouldn't see him until I went up and stopped the  
engine and he came back.

Q. You mean that he would go on and set the switches or exam-  
ine the switches and go at something else?

A. He would go and set them, don't think he examined them,  
I never did see any one examine them, only to see whether they  
was thrown or not to get out.

Q. That is what I mean?

A. Yes, sir.

Q. Mr. Wright, where were you on the night of the 13th of  
February, 1909—you don't remember the date but the night that  
D. E. Earnest was hurt?

A. I was running the pusher engine, # 1012.

Q. What were you pushing?

470 A. Pushing No. 82. I had double-headed # 16, and then I came back and went to Vivian and went after # 82.

Q. Was # 82 the train that was passing coming east that John Drawbond with his engine was expected to push that night?

A. Yes, sir. When I was coming east and when I got about opposite the tank I got up off my seat, knocked the seat from under me, and stood in the back end of the cab, looking across along on the other track to see what other engine was going to push us, for we generally got two engines from there or Morgan.

Q. Was that at North Fork?

A. Yes, sir. When I got a little bit east of the tank or wharf this engine 893 was coming up east of the coal wharf and somewhere near No. 3 track, or No. 3 switch. There was a man in front of the engine, about 20 yards, with a torch in his hand, waving it. I didn't know who he was, couldn't tell who it was after dark and somewhere about eleven o'clock.

Q. Which way was he waving the torch?

A. Waving it something like that. (Indicating up and down)

Q. Did he appear to be waving it at your train?

A. I don't know, sir, who he was waving it at. Might have been waving it at our train, or might have been waving the other man ahead.

Q. Where was he?

471 A. As near as I could tell he was on the track.

Q. I mean at what point on the track, or about what point on the track was he?

A. It looked like he was somewhere about twenty yards ahead of the other engine, somewhere near No. 2 switch where he got hurt at.

Q. What is that?

A. Somewhere near No. 2 switch, where he got hurt at.

Q. Somewhere near No. 2 switch where he got hurt at?

A. Yes, sir.

Q. Who was firing for you at that time?

A. J. W. Earnest.

Q. Is that John Earnest?

A. Yes, sir.

Q. From your position running on your train within what distance could you see over there and see that engine and that man in front of it?

A. Well, I ought to have seen the man I reckon about twenty-five yards, and the engine I could see a little bit longer because the engine was high up.

Q. Explain to the jury why it was you could not see any farther than that.

A. Well, I was on the right hand side, and I was looking through the gangway and over the corner of my tank. Of course I was going away from them, and going faster than they was, and the coal on the tank seemed to knock my view off.

472 Q. You were standing on the right hand side of the engine, and they were over on the left hand side. Is that it?

A. They were on the left hand side of my engine, yes sir.

Q. You were coming east?

A. Yes, sir.

Q. And you got back to the gangway so that you could see between the space in between the tank and the engine?

A. The space between the cab and the tank.

Q. Well, as soon as you passed a little way then the tank cut your view off?

A. Yes, sir.

Q. You didn't see them any farther?

A. No, sir.

Q. How far could John Earnest—Where was he?

A. He was standing on the left hand side in the gangway.

Q. Well, as his attention—Was his vision obscured in the same way yours was?

A. No, sir.

Q. Why not?

A. All he had to do was to turn right that way, (Indicating) and he could see in front and behind.

Q. How far would the train run before it would be out of his vision?

A. Somewhere about one hundred yards.

473 Q. Would it pass the station or not?

A. A little bit past the station, yes sir.

Q. A little bit past the station?

A. Yes, sir.

Q. Here is the map introduced here. This is the track as they come east. Can you point out the station on that plat?

A. I think the station ought to be right here.

Q. What is that?

A. That is the station. The yard office is right in here, in front and across from the needle point, and the station is a little bit west of the yard office.

Q. This is marked "station" isn't it?

Mr. MOORE: We object. Witness is putting his finger somewhere else.

Mr. SMITH: No, you are mistaken. You have not followed him.

A. The yard office is right straight across from the needle point, and the station is just a little space in here west of the yard office. It is a little bit west of the yard office, the station is. This is the crossover in here, coming westbound to eastbound track, a little yard office in here, and you could come out of the door here and throw the switch here. The station set just a little bit west of the yard office.

Q. Take the witness.

Cross-examination.

By Mr. MOORE:

474 Q. How fast was your train running that you were on?

A. I reckon some ten or twelve miles an hour.

Q. How far in yards or feet were you from where the engine that was coming off of track No. 3 was when you passed?

A. How is that, Mr. Moore?



Q. Let the stenographer read the question. (Which is done.)

A. How far were — yards *in* feet?

Q. How far were you, in yards or feet, while you were passing there and engine 893 was coming out on track No. 3?

A. I don't know, sir, exactly how far. It was across the west-bound track over to No. 3. That would be the westbound main line, No. 1, and No. 2, and they were coming up to the needle point of No. 3, somewhere along about No. 3 switch. I don't know how many yards or feet. Don't suppose it would be over 40 yards.

Q. Forty yards?

A. Something like that I reckon.

Q. How close were you to that station when you saw what you have testified to?

A. I reckon I must have been 50 yards west of the station.

Q. Now you say you don't know who it was going out. It was in the night time?

A. Yes, sir.

Q. What was the reason you couldn't tell who it was giving that signal up and down?

A. Well, I was moving along, and it was pretty hard for me to tell while going along, and he changed his torch. If he had held his torch up still in front of him I might have seen his face and known who it was.

Q. Did he have a good bright torch?

A. Yes, sir.

Q. You had no trouble at all in seeing the torch.

A. No, sir.

Q. But you couldn't tell who the man was you saw signalling?

A. No, sir.

Q. Was it dark all around the man except for the light of his torch?

A. No, sir; it wasn't so very dark around there. There are several lights around there.

Q. The signal that you saw, was it an up and down signal?

A. A kind of signal something like that. (Illustrating up and down.)

Q. Wasn't it the regular railroad signal to proceed?

A. The regular signal to come ahead sorter.

Q. You say you couldn't tell exactly where that signal was?

A. I said it looked like he was right on the track.

Q. But you couldn't tell at exactly what point on the track it was?

A. About No. 2 switch.

Q. Couldn't it have been about No. 3 switch?

A. No, sir.

Q. You do tell the jury it could not have been at No. 3 switch?

A. Well, I have been running an engine out of the yard for six years, and passing along there two or three times a day, and I say it looked like a man would have some kind of landmarks and lights around there he could tell pretty well where he was at by.

Q. Could you tell that night as well where that signal was being given as you could have told if it had been daytime?

A. Very good, yes sir. If there had been a lot of engines standing there it would have knocked my sight off and you couldn't have told so well, but there was nothing along there.

Q. Mr. D. E. Earnest said he gave the regular up-and-down signal at No. 3 to come ahead. Is that the signal you say?

A. No, sir.

Q. You are positive of that?

A. No, sir; that is a little bit west of what we call the old pump house.

Q. It is 130 feet from No. 2. How far were you from No. 3?

477 A. Well, I wasn't very much farther *than* from No. 3 than from No. 2.

Q. You were fifty feet west of the station?

A. I reckon I was fifty yards west of the station.

Q. That was the regular proceed signal then that you have described?

A. Do you mean for an engine to come ahead?

Q. Yes.

A. Well, that is the signal for to come ahead.

Q. Was there anything unusual about the signal you saw?

A. No, sir.

Q. It didn't attract your attention in any way?

A. Not any more than just seeing him wave it.

Q. If you thought of it then at all you just thought he was waving it to the engineer to come ahead?

A. No, I thought he was waving at us going by.

Q. What made you think he was waving at you to go by?

A. Well, he knew his brother was firing for me, and he knew what engine we had, and it is always natural for anybody to wave at one another that way, especially when they are closely connected that way.

Q. How did he know that your engine was in that train?

A. I reckon he was looking for it, like we always do. We ran first in and first out, pusher men always look to see how they stand when they go down the hill.

478 Q. How many engines ran down that hill that night?

A. I think he and me were the only two pushers out.

Q. Well, will you tell me how Mr. David Earnest knew that his brother was on that engine that night, or knew you were on that engine that night.

A. They have a black-board down there where we report at, that they mark the crews up on, and the engines, and what time they report, and he was the next man out to us, and he was marked out right under us. He knew we had gone out.

Q. Did you yourself know he was going to push you out that night, or help?

A. No, sir.

Q. Then if you didn't know he was going to help push that train

out with you, you being one of the pushers also, why are you telling that Mr. David Earnest knew you were going out?

A. Because Mr. David Earnest came out behind us, and could look on the register and see what engine went out.

Q. That then is the reason he knew you and his brother would be on that train?

A. Yes, sir.

Q. Whose business is it to register engines?

A. Mine.

Q. Does the fireman have anything to do with that?

A. Register the engine?

Q. Yes.

479 A. No, sir.

Q. Well, was it Mr. David Earnest's duty to go to that register and examine it and register the engine he was going out on?

A. No, sir; not without the engineer told him.

Q. Well, then, was it John Earnest's business, being a fireman of yours, to go to the register and register out the engine so as to show he was going out, unless you told him?

A. He had the privilege to look at the register if he wanted to.

Q. I am not asking you that. You understand my question. You have stated that they were registered out, and that he could tell by looking on the register who had gone out, or who was going out with engines. Now I ask you if it was the business of John Earnest, your fireman, or was it the business of Dave Earnest, the fireman for Drawbond, to go and examine that register and register the engines out, or to see who was going out?

A. Who do you mean register out? What do you mean, that we had an opportunity to see whether Mr. Drawbond had registered out? He came out behind us.

Q. Who makes the entry on the register?

A. I do the registering.

Q. Does Earnest have to register the engine?

A. No, sir.

Q. What kind of registering did Earnest have to do there?

480 A. He didn't have to make any that I know of.

Q. Did John Earnest have to make any entry on the register?

A. No, sir.

Q. So then you engineers were the ones who had to make the entries on the register?

A. Yes, sir.

Q. You tell the jury he knew he would be on this engine because he could look at the register and find out?

A. I said he could look at the blackboard. He has got to look at the blackboard to find out what engine he is going to get if some one don't tell him.

Q. From switch No. 2 down to switch—well, to the station, is 800 feet. You say that when you saw this you were about fifty yards west of the station?

A. Why, yes sir, something like that.

Mr. WINGFIELD: I will state, so that counsel may not mislead the jury, and for the benefit of the witness, who does not know this map, that according to the scale on the map which Mr. Moore has before him and is questioning the witness upon, it is a little bit over 400 feet.

Mr. MOORE: I object, your honor, to counsel interrupting my cross-examination.

The COURT: I think it fair in making a statement of that kind to the witness from the map that you should say "as I understand the map."

Mr. MOORE: All right, I will adopt your honor's ruling.

Q. From switch No. 2 down to the station it is 400 feet  
481 as I read the scale on the map that has been introduced.

Now you have stated that you were fifty yards west of the station, which would be 150 feet, and which subtracted from 400 feet above mentioned, would have put you 250 feet from switch No. 2, or 380 feet from switch No. 3. Do you feel positive that you could tell at which switch you saw that proceed signal you have been referring to?

A. Yes, sir; I do. I know he wasn't at No. 3 switch. The engine was standing there and I had a full view. I came along there on the main line, and I could see No. 3 switch, and No. 2 switch, and all of the switches east of that, and there were no cars in there.

Q. From the point which you occupied at the time you saw the proceed signal you tell about wasn't No. 2 switch almost exactly between you and No. 3 switch, on a straight line?

A. How is that again, Mr. Moore?

Q. I will ask the stenographer to repeat the question. (Which is done.)

A. No, sir; if No. 2 switch had been between me and No. 3 switch I would have been going by the station.

Q. Well, now, put this straight-edge on the map, and I presume it will be admitted at least that it is a straight edge, and extend same from No. 3 on by No. 2 and down to the railroad track where you were, and see whether or not No. 2 switch wasn't almost identically on a straight — between you and No. 3 switch?

Mr. SMITH: Now, Mr. Moore, just let the witness do his  
482 own indicating. You have asked your question and done your pointing.

Mr. MOORE: We object to these interruptions.

The COURT: Let the witness answer the question.

A. Do you want to turn the map over so the jury may see?

Q. You fix it any way you want to.

A. This is the cross-over right in here. Here is the yard down in here, where the switches are. Over here is where I was at, and I was going along up in here, and was looking over here where they were coming out of the track at, where engine 893 was coming out at. You see here is where the switches are at. Here is where the lead comes in. The lead kinder comes down in here like this, and the main line goes like that. I was looking across here through these switches.

Q. Didn't you tell us awhile ago you were 150 feet or 50 yards west of this station when you saw that?

A. I was something like 50 yards west of the station.

Q. Now then, according to this scale 150 feet west of this station on the main line going east would put you right here. Isn't that the point where you were?

A. No, sir.

Q. Haven't you told us that you were 50 yards west of the station on the main line going east?

A. I told you I was coming right along in here when I  
483 seen that.

Q. Didn't you tell us you were 50 feet west of that station?

A. No, sir; I didn't tell you I was 50 feet west of that station.

Q. Not fifty feet but fifty yards. I meant fifty yards. We will fix this rule down here now, and didn't you tell us you were 50 yards west of the station?

A. I said 50 yards, but I didn't say how much more, maybe I was more.

Q. You did tell us about 50 yards?

A. I did tell you I was coming along here opposite No. 2 and No.  
3.

Q. Of course, and going here farther east.

A. Yes, sir; I said I was coming along here, and looked over from the main line and saw the engine coming off the spark track.

Q. Yes, you said that, and then you said when you got up here about fifty yards of the station you saw the proceed signal given—

Mr. SMITH: He didn't say when he got up there. You asked witness at what point he was and he said he thought he was about 50 yards.

Mr. MOORE: I have the witness.

Mr. SMITH: I know you have, but you must not state what the witness has not said.

Mr. MOORE: I haven't done so.

Mr. SMITH: I think everybody now understands the situation.

484 Q. I indicate on this map a point 150 feet from the station on the eastbound main line, and have a straight-edge on the map extending from that point on up to No. 2 and No. 3 switches, and will ask you if that isn't almost identically on a straight line from the point 150 feet west of the station to No. 2 and No. 3?

A. It is straight if you are coming up the main line here. You can kinder make it straight if you go down the lead.

Q. Were you coming up the main line?

A. Yes, sir; I were going up the main line here.

Q. I want the jury to see that. I will ask the jurors to come here and look at it. Here is the point where witness says he was.

Mr. SMITH: He didn't say he was there. Your honor, if Mr. Moore wants to testify I suggest he be sworn and get on the stand.

Q. There is point 150 feet west of station where he was. At No. 8 on the rule is switch No. 2. At 10½ on the ruler is switch No. 3. You say this was in the night time?

A. Yes, sir; after dark.

Q. You have told us what the fireman had to do in coming out on that track. Has the engineer got anything to do when he is driving his engine on that track?

A. Oh yes sir, he has a right smart to do.

Q. Well, didn't have to look at anything, did he?

A. Well, there are lots of things he has got to turn his  
485 head to look at.

Q. When up there on a pusher engine coming off No. 3 what does he have to turn his head to look at?

A. A heap of things. He would have to turn his head to look at a lot of things, lots of things to attend to put there as duties of the engineer.

Q. What are those duties?

A. He has injectors, and to see that everything was going on all right, and the brake valve to look after, and watch his lubricator. Of course he wouldn't have to turn his lubricator on until he got out on the main line, or got behind the train, if he didn't want to.

Q. He didn't have to do that?

A. No, sir.

Q. Can you think of any other duty an engineer has up there except looking about his lubricator and injector and these other things?

A. Why, I don't know, he might want to do some little work on her while he was coming out of there, as a man does a heap of times. He might want to get his monkey-wrench out of the box and do a little something.

Q. Is that all you can think of that he might want to do while coming out of the yard?

A. Yes. Of course he kinder keeps his eye in front, watching out a little bit ahead.

Q. What is the use of his watching out a little bit ahead? Isn't it more important for him to get his monkey-wrench than to watch  
out ahead?

486 A. I don't know as it is.

Q. It is more important to work at the injector, get the monkey-wrench, or do some other things than it is to lookout ahead?

A. Of course he will be coming out and looking a little bit ahead, and if he don't see anything and he has anything to do inside he will spare a second or so at that.

Q. Why not take half a minute, or two minutes, and do something else inside?

A. He don't want to keep his eye off the rail too long from in front of him.

Q. Why doesn't he want to keep his eye off the rail?

A. He might want to see something.

Q. What is the use of looking to see something on the rail?

A. Well, if there was anything there he wouldn't want to tear up the engine or do any damage to anything.

Q. How would he keep from tearing up the engine by looking at the rail?

A. Why, by seeing whether there was anything in the way anywhere around I reckon. There are other engines to come in on that lead. Engines are backing down with no headlight, and he

must look to see that he don't run against anybody, or let anybody run against him.

Q. So he would keep a lookout to see that he didn't run into another engine?

A. Certainly he would.

487 Q. Would there be any use to look out to see whether his switches were right?

A. Not if the fireman had gone on up ahead of him, it wouldn't be necessary.

Q. Suppose the fireman hadn't done his duty, and hadn't gone on ahead, would it be the engineer's duty still not to look out?

A. He would be responsible for anything that happened then.

Q. Who would be responsible?

A. The fireman.

Q. The fireman would be responsible?

A. Yes, sir; if he didn't do his duty after he told him he was going to set the switches it would be up to him.

Q. Then if you were running an engine on the railroad, and you told your fireman to go and do a particular thing, and you don't see that he does that but leave it all to him, there is no responsibility on you. Is that your theory of railroading?

A. It would be there in the yard. If he was to come and tell me—If you were firing for me and told me I might come on up, that you would set the switches and for me to come on up, I presume that you have set those switches and would go on up to the point I wanted to stay at.

Q. So then you need not look out after that time?

A. Of course I would kinder watch ahead of me a little, yes sir.

488 Q. If the fireman has gone on to set the switches how are you going to manage to run into that engine you would be looking for?

A. He might meet the engine before he got up there and I would be looking out for the engine.

Q. Well, would you tell him then if he met an engine down on the track to stop it?

A. No, sir.

Q. You wouldn't tell him anything of that kind?

A. No, sir; but if there was room for the engine to get in below me so I could get out on that switch.

Q. If the engine went in below you that would leave the switch against you?

A. He would look after that.

Q. How would you know that he looked after that?

A. Of course if he met this engine coming in before I came out he would naturally suppose the switch was against me.

Q. Does the book of rules, where it says it is the duty of the engineer to keep a constant lookout for signals and obstructions, have any application to the duties on the North Fork yard?

A. No, sir; I don't know that it does.

Mr. WINGFIELD: Let the witness have the entire rule.

Q. You tell the jury that where Rule 554 says it is the duty of an



engineer to keep a constant look out for signals and obstructions, has no application on the North Fork yard?

489 Mr. SMITH: Let the witness see the entire rule.

Q. I will read to him what I refer to. Rule 554, under the duties of enginemen: "Must keep a constant lookout for signals and obstructions." Now I ask you this question, has that any application to the duties of engineers on the North Fork yard?

Mr. SMITH: Let him have the rule book and read it for himself.

Mr. MOORE: All right. I will put the whole of Rule 554 in evidence.

A. Why, not any more so than in any other yard, I wouldn't think. That is no terminal yard, and it is operated under yard boards. It is no terminal yard.

Q. Are your rules just made for terminal yards and not for yards like the North Fork yard?

A. This book of rules calls for terminal yards, and then we have special instructions for these yard boards.

Q. Have you any special instructions on your yard board that contravene that Rule 554?

A. No, sir.

Q. Isn't it the duty of the yardmaster under Rule 522, which you have just read, and as you understand it, to see that the general rules of the railway company are enforced on the yard?

A. Certainly it is the yardmaster's duty to see that the rules are carried out right.

490 Q. Let me ask you this question: As you understand the rules has Rule 102-A, page 30, any application, which rule in part reads as follows:

"When within yard limits trains must run with great care and under control of the engineman. Trains and engines have the right to move within yard limits by direction of the yardmaster."

A. That is where they want to run scheduled trains or anything, or want to change the movement, or anything, you are supposed to do it under the yardmaster's instructions, or message. You are supposed to get a message from him when he wants to change a movement.

Q. How about the first paragraph of that. We understand your construction of the second paragraph:

"When within yard limits trains must run with great care and under control of the engineman."

Does that apply to North Fork yard?

A. Certainly, we have got to run through there kinder under control, yes sir. But it don't apply to coming off the lead there, I shouldn't think.

Q. If it don't apply to coming off the lead why doesn't it?

A. Because a man never comes out of a place like that like he is going to make a flying run on the road, like he had a passenger train. He comes out of the yard at a moderate rate of speed always.

Q. He ought to come out of the yard with more care than he would use when running on the road?

491 A. Certainly.

Q. Well now, is an engine displaying markers, with or without cars, a train?

A. An engine equipped with proper signals is a train.

Q. Well, is an engine displaying markers used in pusher service coming off North Fork yard a train, and subject to the rules of the company?

A. It would be a train, yes sir, whenever he puts up his signals and comes out and gets to the main line. When he gets on the main line he is a train.

Q. And subject to the rules of the company?

A. Yes, sir.

Q. Does it get to be a train when the markers are put on it?

A. How do you mean?

Q. When it started out, or does it get to be a train when it gets on the main line?

A. Well, there ain't any of them considered a train until he gets his orders to go.

Q. Suppose he has got his orders to go, to report at eleven o'clock, with orders to go out at 11.15, and he goes there, and the markers are on his engine, and he climbs up on the engine and starts with the orders in his pocket or in his head as the case may be, is that engine then a train and subject to the rules of the company?

A. Certainly it is subject to the rules of the company.

492 Q. Well, is it a train?

A. Well, it is a train in one respect, and an engine in the other.

Q. Then please read the definition of train at page 8 of the book of rules and tell us what you think about that engine, whether it is a train or not?

A. Do you want the whole page read.

Q. Not unless counsel for the railroad want it read. My question was to read there the definition of a train and then to tell us whether or not that engine was a train, made up on switch No. 3 and displaying signals, with an engineer on it with his orders to travel?

A. Certainly it was a train, Mr. Moore. He didn't have any train, was only a light engine, but it would be as much a train as thought he had one hundred cars.

Q. Then it was subject to the rules as well as if he had had one hundred cars, wasn't —?

A. Certainly, he was working under the rules of the Norfolk & Western.

Q. And these rules apply to the whole system, don't they?

A. Yes, they apply to the whole system.

Q. Answer so the jury can hear?

A. Yes, sir; they apply to the system.

Q. Then wasn't that engine subject to Rule 106, at page 31, which says:

"In all cases of doubt or uncertainty the safe course must be taken and no risks run.

493 A. Certainly he must take the safe course.

Q. Was that engine subject to that rule?

A. Yes, sir; it was subject to that rule.

Q. If you were coming out of that yard on track No. 3 would you be expecting a signal at switch No. 3?

A. If I was coming off of track No. 3 would I expect a signal at No. 3?

Q. At switch No. 3?

A. No, sir; not always.

Q. Not always. Well, when would you expect it?

A. Well, if he was there maybe he would give me a signal, and maybe he wouldn't.

Q. Well, if he wasn't there would it be his duty to be there?

A. Not necessarily, no sir.

Q. It is the duty then of the fireman to go ahead and pass over No. 3?

A. If he told me he was going on and throw the switches and for me to come on out when I got ready, I would come out and wouldn't know where he would be.

Q. And drive right through to the main line?

A. No, sir; I didn't say that.

Q. Would you keep your eye on the track any part of the time while you went out?

A. Yes, sir; I would keep my eye on the rail some, out in front of me.

Q. You would keep your eye on the rail?

A. I would keep my eye in front of me.

494 Q. As an engineer isn't that your prime duty to keep your eye on the rail, and keep a constant lookout for signals and obstructions?

A. As much as you can, yes sir.

Q. Would you pass over switch No. 3 if you didn't know it was right?

A. Why, if I couldn't see it why I would stop and find out, but if the fireman had gone up there I would presume the switch was right.

Q. Suppose you didn't see the fireman go up there, then what would you do?

A. Well, if he told me he was coming up there I would think he had done gone, and would be as good as his word.

Q. You would pull the throttle open and go on?

A. Yes, sir.

Q. Suppose the fireman was on the track would you run over him?

A. I wouldn't aim to run over him, no sir.

Q. Well, how would you keep from running over your fireman?

A. If I seen I was going to run over him I would do all I could not to run over him.

Q. What would keep you from seeing him?

A. Well, I don't know what would keep me from seeing him.

Q. You don't know of anything, do you?

495 A. I don't know what might keep me from seeing him.

Q. If he got his foot caught in the frog would it be your business to look somewhere else and drive right over him?

A. It would not, but it might be a little dark and you could not see him unless you look close.

Q. You say there are electric lights there, and this man had a bright torch.

A. An electric light near No. 2 switch.

Q. If there are electric lights there, and he had a big bright torch, would it be your duty to see him or to run over him?

A. Maybe when he fell his torch might have went out.

Q. Who told you he fell?

A. Nobody told me he fell, but I would suppose that he fell. He caught his foot, and he didn't get mashed up anywhere but his leg, did he?

Q. If he fell and his torch went out you wouldn't have any further concern about the track after that?

A. Oh yes, I could see the track some from the lights along there.

Q. Then the lights were enough to see by, so you could see a man along or lying on the track ahead of you if you were looking?

496 A. No, sir; not without you are looking very close maybe you wouldn't. A light will shine on a bright rail right smart where you can see the rail.

Q. That is all.

Re-examination.

By Mr. SMITH:

Q. Now, Mr. Wright, that Rule 102-A that Mr. Moore called your attention to—

"In all cases of doubt or uncertainty the safe course must be taken and no risks run"

did that rule apply any more to an engineer than it did to a fire-man?

A. No, sir; I don't think it did. We both have the same book.

Q. Now, in reference to the train passing along when you said that you saw this man: When you testified in chief and when you testified on cross-examination in reference to it I understood you to say that you were somewhere opposite or straight across the track from them?

A. Yes, sir.

Q. From what switch?

A. From all these switches, 3, 2 and 1, all the way up there. The farther up this way you get the closer to the lead you get. When you get up here about No. 1 there was only the westbound main track between you and the point here, and down here there were two or three tracks between you.

497 Q. You explained to the jury when you testified in chief that you couldn't see but a short distance. I will ask you if you could have seen when you got up to a point indicated by Mr. Moore by that rail?

A. Somewhere near that point.

Q. Could you have seen when you got up there those switches?

A. You could see here for a right smart distance. For this time, from the time I got even with him across here from No. 3 you could see way up here very near to the west end of the cross-over.

Q. How were you located on the cab?

A. I was standing in the back part of the cab, maybe with my hand up in a little back window, or maybe my arm around the door casing, looking out the back part of the cab, out through the gang way, and over the corner of the tank.

Q. Well, would anything obstruct your vision after you passed on some distance?

A. Nothing but the coal on the tank.

Q. Well, you couldn't see for that could you?

A. No, sir.

Q. You said there was a blackboard kept down there in the yard. What was put on that blackboard?

A. Why, on this blackboard they marked up what engines a man was going to get, and the engineer and fireman, and the time he reported.

Q. Now, how could Mr. Earnest ascertain what engine he was going to fire?

A. By looking on the blackboard up there.

Q. Was that the way he was supposed to ascertain it?

A. Yes, sir.

Q. A fireman didn't always fire the same engine?

A. No, sir.

Q. An engineer didn't always run the same engine?

A. No, sir.

Q. And he went to the blackboard to see what engine he would be on?

A. Yes, sir; to see what engine he was going to get.

Q. When the engineer registers out does he register his fireman, too?

A. Yes, sir.

Q. He indicates that he and his fireman have come together on that engine by registering, does he?

A. Yes, sir.

Q. Did you leave that yard that night in pusher service?

A. Sir?

Q. Did you leave North Fork yard that night in pusher service?

A. I was called to double-head No. 16. I double-headed 16, and came back and got instructions to go to Vivian for 82. Of course pushers always generally double-head.

Q. Did you register out of North Fork yard that night?

499 A. Yes, sir.

Q. With John Earnest?

A. Yes, sir.

Q. As engineer and fireman as pusher for 82?

A. No, we registered out as engineer and fireman of engine 1012. Of course we didn't know what we were going to do then.

Q. Engine 712?

A. No, sir; engine 1012.

The COURT: The last answer of the witness has attracted my attention to a point I wish brought out. You say you didn't know when you registered out what your engine was going to do?

WITNESS: No, sir; I didn't know what we were going to do, until we got instructions from the yardmaster.

Q. Does the blackboard show the next engineer and fireman what your engine was going to do?

A. Not unless they come out pretty close to us. The roundhouse force wouldn't maybe have an order for another engine, and they wouldn't mark them up until the yardmaster orders them, or whoever does order them. Then when he orders them they mark them up.

Q. Marks up, what you are ordered to do?

A. No. He would go and get his list to see who was first out, and if Mr. Earnest and myself were first out he would mark us up, and when we went to see what engine he was going to give us, would mark Wright and Earnest, and what engine, and what time we reported. And then he wouldn't do any more marking until he ordered another crew, and then would go over the same thing again to see what crew and engine to get for the next run.

500 The COURT: Now, when David Earnest went to the blackboard, if he did go there at all, I understand you to say he would simply see the fact that you and your fireman and engine 1012 had been ordered out for duty, but wouldn't know from the blackboard what work you had been ordered to do?

WITNESS: We worked in pusher service all the time, and of course we double-headed these passenger trains. We were the regularly assigned pushers.

Q. What I am trying to get at is, whether he would know from the blackboard?

A. Yes, sir; he would know what we were doing.

Q. But that wasn't written up on the blackboard?

A. No, sir; but he would see us on the blackboard and what engine we were on.

Q. That is all.

Recross-examination.

By Mr. MOORE:

Q. You say then the blackboard would show that John Earnest and Dave Earnest for example, had been ordered out to duty, or that Eugene Wright and John Earnest had been ordered out to duty, but would that blackboard show what trains they were going to push?

A. No, sir; I didn't say they would show what trains they were going to push.

Q. Certainly, but I want the jury to know that you haven't said it. As a matter of fact, you and John Earnest before 82 came along that night had already been pushing some other trains?

A. We had double-headed 16.

Q. So then the blackboard didn't show what trains you were going to push?

A. No, sir; we might push four or five trains before our day is up.

Q. The blackboard didn't help you about that?

A. No, and I didn't say that the blackboard showed what trains we were going to push, but we were in the pusher service. The blackboard showed what engine we had.

Q. That is all.

Re-re-examination.

By Mr. SMITH:

Q. When the engine was passing on the main line and a man was standing about No. 2 switch in North Fork yard could he see what engine was pushing that train?

A. Yes, sir.

Q. How would he see it?

A. He could see it by the number on the headlight.

Q. That is all.

(And witness leaves the stand.)

Defendant closes in chief.

502 And thereupon the plaintiff to further maintain the issue on his part, introduced the following evidence in rebuttal.

D. E. EARNEST—The Plaintiff.

Examined in chief

By Mr. MOORE:

Q. Mr. Earnest, in the discharge of your duties as fireman, acting as switchman, on the night of your accident was it or not your duty to carry a torch or lamp or some other similar instrument as you proceeded ahead of the engine?

A. Yes, sir.

Q. Now then I will ask you if under the signal rules at page 13, Rule 7, you were not then acting in the discharge of your duty in carrying that torch with you that night, which rule reads as follows:

"7. Employe's whose duties may require them to give signals must provide themselves with proper appliances, keep them in good order, and ready for immediate use."

A. Yes, sir.

Q. A boy or young man in the employ of the railway company



by the name of Charley Cox I think it was, testified on yesterday that he went to the hospital to see you, and testified to a statement that you made to him with reference to the injury. I will ask you if you remember this boy or young man coming to the hospital  
503 while you were there with your leg cut off?

A. Yes, sir.

Q. What did he bring you?

A. He brought me my check and brought the payroll so I could— We had to mark on the payroll when we received the check, make our mark, a cross-mark, and he brought them.

Q. Now, he made quite a lengthy statement as to what you said to him, and I won't undertake to go into the particulars of it but you heard his statement. Please tell his honor and the gentlemen of the jury whether you have any recollection of ever making to him a statement such as he says you made?

A. No, sir; I do not. I do not remember anything about telling him anything about what he said on yesterday.

Q. A good deal has been said by a few witnesses about there being no harm in running over these switches without their being set. Will you please state whether or not you know if it is in violation of the instructions to engineers to run their trains over the switches without their being set?

A. Yes, sir; it is in violation of the company's rules.

Q. Well, who gives those instructions then to these engineers not not to run over these switches until they are set?

504 A. I think the book of rules says you must not run over them. It is a rule we always knew, and we knew we could not run through them. I don't know just where they get it, and don't know whether it is in the book of rules or not, but we always knew it was against the company's rules to not run through them, because you would have to go ahead and set them.

Q. You knew it would be against the company's rules to run through them?

A. Yes, sir.

Q. One gentleman who testified yesterday said that some superintendent or something might make trouble about it if they ran through them that way. Was that correct?

A. Yes, sir.

Q. Well, Mr. Gardner, the last engineer who testified on yesterday, said that it was the duty of the engineer to keep his eye on the track, to watch out for obstructions, and he said the fireman might be an obstruction, and that the rule applied to the whole system. Is that the way you understand it?

A. Yes, sir.

Q. Mr. McDaniel said, in substance, as I remember it, that if the switches were run through the superintendent would make trouble about it but that he might not discharge an engineer for it. Do you know anything about that?

The defendant company, by its attorneys, objects to the question

because witness cannot undertake to state what might or  
505 might not be in the mind of the superintendent.

The COURT: Unless the witness' answer would contradict the statement I do not think it rebuttal and therefore inadmissible.

Mr. MOORE: No, sir; it would not be in contradiction.

Q. Mr. Earnest, did you know whether your brother was on train #82 the night of this accident?

A. No, sir.

Q. Where were you, Mr. Earnest, at the time you waved to some one on the passing train not knowing who it was?

The defendant company, by its attorneys, objects to the question because having already been gone over in chief, and this is merely an attempt to get a last say of it before the jury.

The plaintiff, by its attorneys, replies that contributory negligence is affirmative proof on the part of defendant, and now plaintiff is answering that proof attempted to be set up by defendant, and that such answer is proper although this matter may have been casually mentioned during plaintiff's recital of the case in chief.

The defendant, by its attorneys, replies that their defense is not contributory negligence but that this is a case of an accident wholly and entirely due to the negligence of the plaintiff.

The COURT: You cannot go over the plaintiff's evidence again after having gone over it in chief, and I will sustain the objection. Plaintiff excepts.

Q. Mr. Earnest, at the time you waved to that passing train were you in sight of the pusher engine?

506 A. No, sir.

Q. Where was the pusher engine on that train at the time you waved?

A. It was the length of the train down the eastbound track.

Q. To the best of your recollection how long was that train?

A. Well, I don't remember how long it was. I didn't see it all pass, and I don't remember how long it was, because I didn't see anything but the head engine and a few cars of it.

Q. Then you were run over before you saw it all pass?

A. Yes, sir.

Q. John Drawbond has testified that when he got down to this engine at the time of accident and pulled you out from under the engine, you told him you were balking along there looking for your brother and got run over. Did you use such language as that to John Drawbond?

A. No, sir; I did not.

Q. He also said that you told him twice that night that you did not censure him for the accident. Did you tell John Drawbond you did not censure him for the accident?

A. No, sir; I didn't use the word censure, because I didn't know what it meant until he testified here and some one told me.

507 Q. What was it that you did tell John Drawbond that night when he got you out from under the engine, as nearly as you can recollect?

A. Well, I don't remember exactly, but I made it appear to him that it was my fault, because he was worrying about it and I didn't want him to worry about it. No I don't remember what I did say to him about it exactly.

Q. He was worrying about it and you don't remember what you did say exactly?

A. No, sir.

Q. Well, now, it seems that several people have undertaken to say what you did say there that night after you were crippled, and while they were attending to your wounds or giving you morphine. Will you tell his honor and the gentlemen of the jury, if you can remember these different statements that these people attribute to you that night?

A. No, sir; I can't.

Q. Were you excited or alarmed that night?

A. Yes, sir; I was excited very much, thought I was going to die, and I thought—

The defendant company, by its attorneys, objects to this evidence because gone into in chief.

Objection sustained.

Q. How soon after this accident was it that the written statements that have been referred to here were taken from you?

508 The defendant, by its attorneys, object to the question because calling for an answer already given in chief.

Q. Was it before or after this boy visited you at the hospital and gave you your check?

The COURT: What statements are you referring to?

Mr. MOORE: He said in chief that he gave two different written statements about the accident. I want to know with reference to the time plaintiff was in the hospital and the man Cox visited him.

Mr. WINGFIELD: We have not examined witness upon that, nor have we introduced nor sought to introduce the statements his counsel asked him about in chief, and we think this examination now wholly improper and irrelevant.

The COURT: I am inclined to think counsel may show that. Defendant excepts.

A. It was afterwards.

Q. Now then I want to ask you this question: After this young man visited you at the hospital one of the parties did take a written statement from you?

A. Yes, sir.

Q. Did you sign that written statement?

The defendant, by its counsel, objects to the question, and says this has been gone into fully in chief.

The plaintiff, by his attorneys, does not insist upon an answer.

Q. A young man by the name of Stuart, who is in the employ

of the railroad company, testified to certain statements that  
509 you made. Did he take a written statement from you?

A. That wasn't the trainmasters' clerk, was it?

Q. I think he said his business was checking cars?

A. No, sir; didn't any car-checker take any written statement from me.

Mr. WINGFIELD: Does your honor think this rebuttal evidence?

The COURT: No, I do not see how that would be in rebuttal.

Q. Well, I want to ask you this question and see if it is objected to. Do you know the names of any of these men who took written statements from you?

Mr. WINGFIELD: We certainly do object, as we have been doing, and say that this is not in rebuttal and is irrelevant.

The COURT: What does it rebut?

Mr. MOORE: Well, your honor may strike that out and we will ask this question and see whether it is objected to:

Q. Has any man who took a written statement from you testified in this case?

Mr. WINGFIELD: We object to the question because not in rebuttal and irrelevant.

The COURT: What is it in rebuttal of, Mr. Moore?

Mr. MOORE: It is in rebuttal of defendant's whole case from start to finish. They bring half a dozen men to swear to what the plaintiff told them, and yet do not bring a man who took a written statement from the plaintiff. We cannot tell the names of the persons; don't think our client knows them, and we want now to  
510 know if the men who have taken the written statements have appeared and testified in this court. I think plaintiff knows that fact, and it has a weight and bearing upon the case which is entirely legitimate.

Mr. SMITH: Your honor, I cannot see where this would be in rebuttal of our case in any sense at all. Suppose this plaintiff had made statements to four hundred people, and we only introduced those we have introduced, is it in rebuttal to show that there are other people who happened to hear him make a statement and yet whom we have not introduced?

Mr. MOORE: I now wish to say that I expect to prove by this witness that the parties who took written statements from him have not testified in this case; that they took two different written statements, and he signed them and left them in the possession of the railroad, but that neither one of the parties who took those statements in writing from him are among the parties who testified on the trial of the case for defendant.

Mr. WINGFIELD: I will ask your honor to retire to chambers for further discussion on this point inasmuch as the gentleman seems bent on making statements more for the benefit of the jury than court or counsel.

(Court and counsel retire to chambers, and after hearing argument the court makes following ruling.)

The COURT: On the ground that a party is not required to produce a self-serving declaration made by his opponent the objection to the question is sustained.

Plaintiff excepts.

Q. Dr. Cook said, in substance, that you said that night at the station you were attempting to throw a switch or something of that kind at the time you were hurt. Can you remember whether  
511 you told Dr. Cook that or not?

A. I don't remember what I did say to him about it now.

Q. Well, if you told Dr. Cook you were trying to throw a switch when you got hurt and can't remember it I understand you not to dispute it but to say that you cannot remember it, and how do you account for the fact that you do not remember it?

The defendant company, by its attorneys, objects to the question because not rebuttal and irrelevant.

Objection sustained.

Q. If I remember Mr. Drawbond said that the rules of the company did not apply to the North Fork yard. What is your understanding as to whether the rules of the company apply to that yard?

A. Yes, sir; they apply to the North Fork yard.

Q. I think that D. M. Jackson also said, in substance, that the rules of the company did not apply to the North Fork yard. Do you still entertain the same opinion notwithstanding Mr. Jackson's evidence?

The defendant, by its counsel, objects to question because not rebuttal.

Objection overruled.

Defendant excepts.

A. Yes, sir; it applies to the North Fork yard, just the same as it does to all yards.

Q. Mr. Earnest, explain to the jury whether it is necessary to have the cylinder cocks open every minute with steam escaping, where you may likely run over some one?

512 A. No sir; I don't think it is.

Mr. SMITH: Are you an engineer?

WITNESS: No, sir; I am not an engineer, but I fired long enough so that it looks like I ought to know that.

Q. Well, if not why not?

A. Why, he could close them and look ahead, and shut them off and close them and look ahead and there wouldn't be any danger knocking the cylinder heads out then.

Q. Then when he found his way clear he could open them again, could he?

A. Yes, sir.

Q. How long would it take to close the cylinder cocks?

A. You just kick them with your foot.

Q. What is the condition of the cylinder cocks when the engine is standing on the yard?

A. They are generally always left open.

Q. For what purpose?

A. So that water will drain out and won't any steam get in there to start the engine. The principal purpose I suppose is to keep the engine from starting.

Q. Then when standing on the yard with the cylinder cocks open water drains out, does it?

A. Yes, sir.

Q. Mr. John Drawbond seems to think that you told him  
513 the night you were hurt that your brother was on No. 82.  
Did you tell him that or not?

A. If I did I don't remember it. I don't remember anything about telling him anything like that.

Q. Well, could you have told him that?

The defendant, by its attorneys, object- to the question because not in rebuttal and argumentative.

Objection overruled.

Defendant excepts.

A. I don't see how I could.

Q. If not why not?

The defendant repeats objection.

Objection overruled.

Defendant excepts.

A. I didn't know he was——

The COURT: I think this point was gone over in the examination-in-chief, and when he says he doesn't remember I think that is a sufficient reply and the balance is argumentative.

Q. Mr. Earnest, do you know of any reason why the engineer should not wait for signals at No. 2 as well as at No. 3?

The defendant, by its attorneys, objects to the question because gone into in chief.

The COURT: I do not remember it and will overrule the objection, unless you go over your evidence and show me where it was gone into.

Defendant excepts.

A. No, sir; I don't see any reason why he should not. Sometimes  
514 they take engines up that way and set them back on No. 3,  
and if they did they would leave the switches open I think.  
I don't see any reason why No. 3 wouldn't have been as likely  
against us as No. 2, or for us.

Q. Then you mean that they might be running engines or setting cars in on No. 2, and that he would be just as likely to find it set against the engineer as No. 3?

The defendant company, by its attorneys, objects to the question because leading and a mere repetition of the answer of the witness.

Objection sustained.

Q. Now, did you mean to say you didn't see any reason why No. 2 wouldn't be as likely to be for you as No. 3, or what did you mean to say about that?

The defendant company, by its attorneys, objects to the question because not in rebuttal.

Objection overruled because seeking explanation of answer.

Defendant excepts.

A. Why, if they set an engine back in on No. 2 that would leave the switch open, and then if on other switch they had not put in any cars or engines or anything back in there, it would be. The last man that went out on No. 3 would leave it open probably. But if anybody had set cars down in there, or anybody had dropped cars down in there they would have left it against us. If anybody was to have come on down into the spark track why they would have thrown No. 3 back against us. So they keep them going that way all the time, and you could not rely on one any more than on another. I would always examine one just as much as I would the other, and be as particular about it.

Q. So if they had moved any cars in on track No. 2 why  
515 switch No. 2 would have been against you when coming out?

A. Yes, sir; and if an engine had dropped down there it would have been against us.

Q. So you examined the switches clear on through?

A. Yes, sir; I examined them all, just as much one as the other, putting just as much attention at one as I did the other.

Q. Was that necessary for safety of the train?

The defendant, by its attorneys, objects to the question because gone into in chief.

The COURT: Objection sustained, and also because leading.

Q. That is all.

Mr. SMITH: Stand aside.

No cross-examination.

(And witness leaves the stand.)

516 JOHN W. EARNEST—For Plaintiff in rebuttal.

Direct examination by Mr. MOORE:

Q. You have stated in your examination-in-chief that you were on train #82 the night your brother was hurt. When you passed switch No. 2 that night did you see anything?

A. Yes, sir; just as I got opposite switch No. 2 I seen a light engine standing there and some one standing there with a torch by the side of it, but I didn't know who the man was standing there with a torch.

Q. So when you passed a point opposite the engine it was standing there?

A. Yes, sir; the engine was standing still. I never saw it moving at all.



Q. And there was a torch and some one was ahead standing there by the engine?

A. Yes, sir.

Q. At which switch was that you are talking about?

A. Opposite No. 2 I think. It was right along there I think about switch No. 2 as well as I can remember.

Q. Was the engine standing still?

A. Yes, sir; the engine was standing still.

Q. And how close by the side of the engine was the torch?

517 A. It was right about the front end of the engine, looked to me like right close to it, but I couldn't tell how close, though it looked like right close to the pilot beam.

Q. On which side?

A. On the right hand side of engine.

Q. Now tell us whether or not Eugene Wright was on same engine with you?

A. Yes, sir; he was on the same engine.

Q. State whether or not it was the duty of the fireman in piloting an engine off No. 3 track down to the lead and the main line in the night time to carry a torch or lantern with him?

A. Yes, sir; it was the duty of him to carry a lantern or torch or something so that the engineer could see me that night.

Q. Witness is with you.

Mr. SMITH: Stand aside.

No cross-examination.

(And witness leaves the stand.)

The foregoing being all the evidence introduced in the case.

518 And thereupon, the plaintiff, by counsel, before the jury retired, moved the court to give to the jury the following instructions:

Plaintiff's Instruction No. 4.

Preponderance means the weight of the evidence; that which carries conviction which impels belief. It is not necessarily controlled by the greater number of witnesses.

Plaintiff's Instruction No. 5.

Negligence is the omission to do that which a reasonably careful and prudent person would ordinarily do under the circumstances of any given situation, or doing that which such a person would not do. It is measured by the exigencies of the occasion.

519 Plaintiff's Instruction No. 8.

The plaintiff had a right to presume that the engineer of defendant company would discharge his duties in a reasonably careful manner and in the usual and ordinary way.

## Plaintiff's Instruction No. 12.

The plaintiff, if entitled to recover, is limited to compensation for injuries actually sustained, and the amount is to be fixed by you in the exercise of a sound judgment. In determining the amount, you may consider the plaintiff's age, his expectancy of life, his earning capacity at the time he was injured, how, if at all, that earning capacity has been impaired, the permanency of the injuries received, and weighing all the facts, circumstances and conditions, subject to plaintiff's instruction No. 6, fix such an amount as will compensate him. And you may allow for pain, suffering and mental anguish, the result of physical injuries.

## Plaintiff's Instruction No. 1.

The Court instructs the jury that, if they believe from all the evidence in the case that the plaintiff was injured while employed by the defendant to work for it as a fireman on an engine engaged in the "Pusher Service" or "Helper Service" on its road at Northfork, West Virginia, and that he had been for several days assisting Interstate trains over the grade east of Northfork, and that at the time he was injured he was conducting or assisting in taking an engine out of the yard at Northfork, and that said engine was on its way out of said yard to be coupled to a train to be pushed by said engine over said grade, and that said train was made up of cars destined from the States of West Virginia and other States to points in Virginia and other States, then they are instructed that said plaintiff was injured while he was employed by the Railway Company in commerce between the States.

520 To the giving of Instruction No. 1 the defendant, by counsel, objected; but the Court over-ruled the said objection, and gave said Instruction No. 1 to the jury, to which action and ruling of the Court in giving said instruction No. 1 to the jury, the defendant, by counsel, then and there excepted, and tendered this its Bill of Exceptions No. 1, and prayed that the same may be signed, sealed and made a part of the record, which is accordingly done this 16th day of September, 1910.

HENRY C. McDOWELL, <sup>2</sup>[SEAL.]  
District Judge.

521 In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST

VS.

NORFOLK & WESTERN RAILWAY CO.

*Defendant's Bill of Exceptions No. 2.*

Be It Remembered, That upon the trial of this cause, after the evidence which is set forth in Bill of Exceptions No. 1, had gone to the jury (which Bill of Exceptions No. 1 is hereby specifically

referred to and made a part hereof), and before the jury retired, the plaintiff moved the court to instruct the jury as follows:

**Plaintiff's Instruction No. 2.**

Until the enactment of the statute of April 22, 1908, an employee, such as the plaintiff was, could not recover for the negligence of his fellow servants, and the rule of law is that a fireman and engineer upon the same engine are fellow-servants.

The statute has changed that rule by providing that an injury which occurs in whole or in part from the negligence of the officers, agents or employees, shall not exempt the railroad from liability. You are, therefore, to carefully inquire into the real cause of the injury. If you find from the evidence that it was through the carelessness of the engineer in failing to use ordinary care in looking out for the plaintiff or to wait for or observe a signal or indication which the jury believe he should have observed or waited for before driving the engine over the switch, the defendant is liable for his affirmative acts or omissions, and if those acts were negligent, and if they were the proximate cause of the injury, then the defendant is chargeable with the engineer's negligence.

522 To the giving of which said instruction the defendant, by counsel, then and there excepted; but the Court overruled the said objections of the defendant, and gave said instruction to the jury, to which action and ruling of the court in giving said instruction No. 2 to the jury over the objections of the defendant, the defendant, by counsel, then and there excepted and tendered this, its Bill of Exceptions No. 2, and prayed that the same may be signed, sealed and made a part of the record, which is accordingly done this 16th day of September, 1910.

HENRY C. McDOWELL, [SEAL.]  
District Judge.

U. S. Clerk's Office, W. Dist. Va., at Lynchburg. Filed Sep. 16, 1910. Stanley W. Martin, Clerk U. S. Court.

523 In the Circuit Court of the United States for the Western District of Virginia.

**D. E. EARNEST**

vs.

**NORFOLK & WESTERN RAILWAY CO.**

*Defendant's Bill of Exceptions No. 3.*

Be it Further Remembered, That upon the trial of this case, after the evidence, which is set forth in Bill of Exceptions No. 1 had been introduced before the jury, (which Bill of Exceptions No. 1 is hereby specifically referred to and made a part hereof), and before the jury retired, the plaintiff, by counsel, requested the court to instruct the jury as follows:

## Plaintiff's Instruction No. 6.

Contributory negligence is the negligent act of a plaintiff which concurring and co-operating with the negligent act of a defendant is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the Act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defence of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence as compared with the negligence of the defendant.

If the defendant relies upon the defence of contributory negligence, the burden is upon it to establish that defence by a preponderance of the evidence.

524 \* To the giving of which instruction the defendant, by counsel, objected; but the Court over-ruled said objection and gave the said instruction to the jury, to which action and ruling of the Court in giving said instruction No. 6 to the jury, the defendant, by counsel, then and there excepted, and tendered this its Bill of Exceptions No. 3, and prayed that the same may be signed, sealed and made a part of the record, which is accordingly done, this 16th day of September, 1910.

HENRY C. McDOWELL, [SEAL.]  
*District Judge.*

U. S. Clerk's Office, W. Dist. Va., at Lynchburg. Filed Sep. 16, 1910. Stanley W. Martin, Clerk U. S. Court.

525 In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST  
VS.

NORFOLK & WESTERN RAILWAY CO.

*Defendant's Bill of Exceptions No. 4.*

Be It Further Remembered, That upon the trial of this cause, after the evidence which is set forth in Bill of Exceptions No. 1 had gone to the jury (which Bill of Exceptions is hereby specifically referred to and made a part hereof, and before the jury had retired, the plaintiff, by counsel, moved the court to give to the jury the following instruction:

Plaintiff's Instruction No. 7.

The plaintiff is presumed to have exercised due and proper care at the time of the accident, and the burden of proving he was negligent is upon the defendant.

526 To the giving of which instruction the defendant, by counsel, objected; but the Court over-ruled said objection, and gave the said instruction to the jury, to which action and ruling of the Court in giving said instruction No. 7 to the jury the defendant, by counsel, then and there excepted, and tendered this, its Bill of Exceptions No. 4, and prayed that the same may be signed, sealed and made a part of the record, which is accordingly done, this 16th day of September, 1910.

HENRY C. McDOWELL, [SEAL.]  
District Judge.

U. S. Clerk's Office, W. Dist. Va., at Lynchburg. Filed Sep. 16, 1910. Stanley W. Martin, Clerk U. S. Court.

527 In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST

VS.

NORFOLK & WESTERN RAILWAY CO.

*Defendant's Bill of Exceptions No. 5.*

Be It Further Remembered, That upon the trial of this cause, after the evidence, which is set forth in Bill of Exceptions No. 1, had gone to the jury (which Bill of Exceptions is hereby specifically referred to and made a part hereof), and before the jury had retired, the plaintiff, by counsel, moved the court to give to the jury the following instruction:

Plaintiff's Instruction No. 9.

If the jury believe from the evidence that it was necessary or usual within the knowledge of John Drawbond for the plaintiff to walk on, along, or over the tracks of the defendant company in front of the said engine while it was moving in order to properly perform his duties of piloting said engine out of said yard, it was then the duty of the defendant company, through its engineer in charge of said engine, to use reasonable care and caution in the management of said engine and to keep such a lookout for the plaintiff as an ordinarily prudent and careful man would have done under the circumstances, to avoid running said engine upon or over the plaintiff; and if the said engineer did not exercise such reasonable care and caution and that his failure so to do was the proximate cause of the accident, then they must find for the plaintiff.

528 To the giving of which instruction the defendant, by counsel, objected; but the Court over-ruled said objection, and gave the said instruction to the jury, to which action and ruling of the court in giving said instruction No. 9 to the jury, the

defendant, by counsel, then and there excepted, and tendered this, its Bill of Exceptions No. 5, and prayed that the same may be signed, sealed and made a part of the record, which is accordingly done this 16 day of September, 1910.

HENRY C. McDOWELL, [SEAL.]  
District Judge.

U. S. Clerk's Office, W. Dist. Va., at Lynchburg. Filed Sep. 16, 1910. Stanley W. Martin, Clerk U. S. Court.

529 In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST  
vs.

NORFOLK & WESTERN RAILWAY COMPANY.

*Defendant's Bill of Exceptions No. 6.*

Be It Further Remembered, That upon the trial of this cause, after the evidence had been given to the jury which is fully set forth in Bill of Exceptions No. 1 (which said Bill of Exceptions is specifically referred to and made a part hereof), and before the jury had retired, the plaintiff, by counsel, moved the court to instruct the jury as follows:

Plaintiff's Instruction No. 11.

That, if they find for the plaintiff, they will find for him such an amount of damages not exceeding \$20,000.00 as will fully compensate him for the suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, the loss of time that naturally and proximately resulted from the injury he suffered; and if they find that the injuries sustained by the plaintiff are permanent, that they will also find for him such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience and the loss of time that he will suffer in the future, subject to instruction No. 6 given for the plaintiff.

In determining this as to the future they will consider the plaintiff's bodily vigor and age, as shown by the evidence adduced.

530 To the giving of which instruction the defendant, by counsel, objected; but the Court over-ruled said objection, and gave the said instruction to the jury, to which action and ruling of the Court in giving said instruction No. 11 to the jury, the defendant, by counsel, then and there excepted, and tendered this, its bill of Exceptions No. 6, and prayed that the same may be signed, sealed and made a part of the record, which is accordingly done, this 16th day of September, 1910.

HENRY C. McDOWELL, [SEAL.]  
District Judge.

U. S. Clerk's Office, W. Dist. Va., at Lynchburg. Filed Sep. 16, 1910. Stanley W. Martin, Clerk U. S. Court.

531 In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST

VS.

NORFOLK & WESTERN RAILWAY CO.

*Defendant's Bill of Exceptions No. 7.*

Be It Further Remembered, That upon the trial of this cause, after the evidence, as set forth in Bill of Exceptions No. 1, had gone to the jury, (which said Bill of Exceptions No. 1 is hereby specifically referred to and made a part hereof), and before the jury retired, the plaintiff, by counsel, moved the court to instruct the jury as follows:

Plaintiff's Instruction No. 13.

That the duty the defendant owed to the plaintiff was to use ordinary care and caution for his protection in doing the work in which he was engaged at the Northfork yards; that is, such care as a reasonably prudent and cautious person would have exercised under the circumstances; and if the jury shall believe from the evidence that the engineer of the defendant company did not use such care as a reasonably prudent and cautious person would have exercised under the circumstances of this case, and that his failure to use such care was the proximate cause of the injury to the plaintiff, then they will find for the plaintiff.

532 To the giving of which instruction the defendant, by counsel, objected; but the Court over-ruled said objection, and gave the said instruction to the jury; to which action and ruling of the Court in giving said instruction No. 13 to the jury, the defendant, by counsel, then and there excepted, and tendered this, its Bill of Exceptions No. 7, and prayed that the same may be signed, sealed and made a part of the record, which is accordingly done this 16th day of September, 1910.

HENRY C. McDOWELL, [SEAL.]

*District Judge.*

U. S. Clerk's Office, W. Dist. Va., at Lynchburg. Filed Sep. 16, 1910. Stanley W. Martin, Clerk U. S. Court.

533 In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST

VS.

NORFOLK & WESTERN RAILWAY CO.

*Defendant's Bill of Exceptions No. 8.*

Be It Remembered, That upon the trial of this cause, after the evidence which is set forth in Bill of Exceptions No. 1 had gone to the



jury (which said bill of exceptions No. 1 is hereby specifically referred to and made a part hereof), and before the jury retired, the defendant, by counsel, moved the court to instruct the jury as follows:

Defendant's Instruction No. 1.

The court instructs the jury that the mere fact that the accident happened and the plaintiff was injured is no evidence of negligence against the defendant.

Defendant's Instruction No. 2.

The Court instructs the jury that in order to entitle the plaintiff to recover in this action, the burden of proof is on him to establish the negligence of the defendant as charged in the declaration by affirmative evidence which must show more than a mere probability of a negligent act. The existence of negligence must not be left wholly to conjecture, and in determining the question of whether or not the Company through its engineer was negligent it must be borne in mind that the defendant, through its engineer, was not compelled to foresee and provide against an act on the part of the plaintiff which reasonable and prudent men would not expect.

Defendant's Instruction No. 3.

The Court instructs the jury that the duty the defendant owed to the plaintiff was to use ordinary care for his protection in doing the work in which he was engaged at Northfork yard; that is, such care  
534 as a reasonably prudent and cautious person would have exercised under the circumstances; and if the jury shall believe from the evidence that the defendant company, through its engineer, exercised this degree of care and caution, then they will find for the defendant.

Defendant's Instruction No. 4.

The Court further instructs the jury that if they believe from the evidence that the custom and practice in the Northfork yard was for the engineer to follow the fireman with his engine as he lined up the switches, and not to wait for a signal to proceed after the first switch, then it was not the duty of the engineer to wait for such signal, and he had the right to proceed without any being given, and the fact that engineer Drawbond did approach switch No. 2 where the plaintiff was injured without any further signal from him is no evidence of negligence against defendant company.

Defendant's Instruction No. 5.

If the jury shall believe from the evidence that it had been the custom and practice in the North Fork Yard for the fireman to go ahead and line up the switches for the engineer and for the engineer to follow the fireman with the engine at the rate of three or four miles per hour after receiving a signal to do so at switch number 3,

and then to proceed without further signals being given; and if they shall further believe from the evidence that at and before the time of the accident which resulted in plaintiff's injury Engineer Drawbond was proceeding in accordance with this custom and practice in said yard, then they are told that it was the duty of the plaintiff to look out for his own protection, and if the jury shall believe from the evidence that he failed to keep such lookout or to use reasonable care for his own protection, and that his failure to do so was the proximate cause of the accident and his injury, then they will find for the defendant.

Defendant's Instruction No. 6.

The Court instructs the jury that the defendant Company was under no greater obligation to care for the safety of plaintiff while engaged in its pusher service in the North Fork Yard than he was to care for himself.

535

Defendant's Instruction No. 9.

The Court instructs the jury that if they shall believe from the evidence that it was the custom and practice in the North Fork Yard for the fireman to line up the switches and for the engineer to follow him at a rate of three or four miles per hour without signals, or upon signal to proceed given at switch number three, and if they shall further believe from the evidence that plaintiff was familiar with this custom and practice in said yard, and that at and before the accident which resulted in plaintiff's injury, Engineer Drawbond was proceeding in accordance with this custom, then they are told that said Engineer Drawbond had the right to act on the assumption and belief that the plaintiff in lining up the switches would take reasonable precaution for his own safety against the approaching engine, and it was not the duty of the engineer Drawbond to keep a lookout for him.

Defendant's Instruction No. 10.

The Court instructs the jury that it was not the duty of the defendant company, through its engineer John Drawbond, to keep a constant lookout for plaintiff while he was engaged in lining up switches, but only to exercise ordinary care in keeping a lookout to prevent any danger which might be reasonably apprehended to him under the circumstances and conditions; and in this connection the court further tells the jury that engineer Drawbond in moving his engine out of the yard had the right to assume that plaintiff would take all reasonable and necessary precautions for his own safety.

536

Defendant's Instruction No. 12.

The Court instructs the jury that if the jury believe from the evidence that the plaintiff's injury resulted from his own negligence and not from any negligence of the engineer in charge of the engine that struck the plaintiff, the jury must find for the defendant.

275

## Defendant's Instruction No. 14.

The Court instructs the jury that if they shall believe from the evidence that it was neither necessary nor usual for the plaintiff to be on the defendant's track while the engineer was moving his engine out of the yard of the defendant at Northfork at the place where the injury occurred, and that the plaintiff's presence on the track at the place where said injury occurred was not reasonably to be apprehended, then they should find for the defendant.

## Defendant's Instruction No. 15.

The Court instructs the jury that if they shall believe from the evidence that the discharge of the plaintiff's duties in regard to the switches did not necessitate his going on the track of the defendant at the place where the injury occurred, and that it was not usual for the plaintiff to go upon the defendant's track at such place, and if they shall further believe from the evidence that just before the accident happened, and while defendant's engineer was approaching the place where the plaintiff was hurt in the usual and customary way, that the plaintiff attempted to cross the track immediately in front of the engine and so close thereto that the engineer could not see him for the purpose of attracting the attention of his brother or signaling to his brother in train No. 82, and that the plaintiff by reason of a mis-step or stumbling, or for some other cause, fell and was run over by reason thereof, that the plaintiff was guilty of negligence, and if they further believe from the evidence that this negligence on the part of the plaintiff was the sole proximate cause of his injury, then they should find for the defendant.

537 Which said Instructions Nos. 1, 2, 3, 4, 5, 6, 10, 12, 14 and 15 the court gave to the jury as requested by the defendant, but refused to give to the jury defendant's instruction No. 9 as offered, but modified and changed said instruction No. 9 by striking from same the concluding paragraph or sentence thereof, *viz.* "and it was not the duty of engineer Drawbond to keep a lookout for him," and as thus modified and changed, the court gave to the jury defendant's said instruction No. 9 (which instructions above set forth, given for the defendant, including defendant's instruction No. 9, as modified and given, together with the instructions given for the plaintiff and set out in Bills of Exceptions Nos. 1, 2, 3, 4, 5, 6 and 7, were all the instructions given to the jury by the court). And to the action of the court in not giving defendant's said Instruction No. 9 as offered by defendant, and in modifying and changing said instruction by striking from same the concluding paragraph or sentence thereof, namely, "and it was not the duty of engineer Drawbond to keep a lookout for him," the defendant, by counsel, then and there excepted, and tendered this its Bill of Exceptions No. 8 and prayed that the same be signed, sealed and made a part of the record, which is accordingly done this 16th day of September, 1910.

HENRY C. McDOWELL, [SEAL.]  
District Judge.

538 In the Circuit Court of the United States for the Western District of Virginia,

D. E. EARNEST

vs.

NORFOLK & WESTERN RAILWAY CO.

*Defendant's Bill of Exceptions No. 9.*

Be It Remembered, That upon the trial of this cause, after the evidence which is set forth in Bill of Exceptions No. 1, had gone to the jury (which Bill of Exceptions No. 1 is hereby specifically referred to and made a part hereof), and before the jury had retired, and at the same time that defendant moved the Court to instruct the jury as set forth in Bill of Exceptions No. 8 (which Bill of Exceptions No. 8 is hereby specifically referred to and made a part hereof), the defendant, by counsel, also moved the Court to instruct the jury as follows:

Defendant's Instruction No. 11.

The Court instructs the jury that the plaintiff D. E. Earnest, in entering into the service of the company as fireman in the pusher service at Northfork, West Virginia, assumed all the risks incident to the service the dangerous character of which he knew or reasonably should have known, as the business was conducted by the defendant company at the time of the injury, and if the jury believe from the evidence that the injury complained of by the plaintiff resulted from the risk the plaintiff assumed and not from any negligence on the part of the engineer in charge of the engine that struck the plaintiff, they must find for the defendant.

539 But the Court refused to give said instruction, to which action and ruling of the Court in refusing to give said defendant's instruction No. 11 to the jury, the defendant, by counsel, then and there excepted, and tendered this, its Bill of Exceptions No. 9, and prayed that the same may be signed, sealed, and made a part of the record, which is accordingly done this 16th day of September, 1910.

HENRY C. McDOWELL, [SEAL.]  
District Judge.

U. S. Clerk's Office, W. Dist. Va., at Lynchburg. Filed Sep. 16, 1910. Stanley W. Martin, Clerk U. S. Court.

540 In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST

vs.

NORFOLK & WESTERN RAILWAY CO.

*Defendant's Bill of Exceptions No. 10.*

Be it further Remembered, That upon the trial of this cause, after the jury had been empannelled and sworn, the plaintiff, in order to sustain the issue joined on his part, introduced as a witness one, D. A. Earnest (All of whose testimony is fully set forth in Bill of Exceptions No. 1, which is hereby specifically referred to and made a part hereof), and the said D. E. Earnest was asked the following questions:

"Q. Do you know whether or not, at the time the engine struck you it was running faster than it was the last time you had seen it?"

to which question the defendant, by counsel, objected, because it called for a mere opinion of the witness, the witness having said that he did not see the engine, but the court over-ruled the said objection. "I think struck by an engine might know something about the speed at which the engine was moving at the time although he was not looking at it, so I will permit the witness to answer the question" and allowed the witness to answer the question as follows:

"A. Why, yes, it seemed to me that it did, that it was running faster."

And the defendant, by counsel, moved the court to strike the said answer out, being a mere expression of opinion.

"Q. I will ask the stenographer to read the question to the witness, as I think he did not conclude his answer, when counsel on the other side interposed objection (which last question is read to the witness).

A. Yes sir, it seemed to me it was running faster, because it seemed it pushed me a little piece on the track after it struck me."

but the court overruled said motion and allowed said testimony to go to the jury. To which action and ruling of the court in allowing the said testimony to go to the jury over the objection of the defendant, the defendant, by counsel, excepted, and tendered this its Bill of Exceptions No. 10, and prayed that the same might be signed, sealed, and made a part of the record, which is accordingly done this 16th day of September, 1910.

HENRY C. McDOWELL, [SEAL]  
District Judge.

541 In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST

vs.

NORFOLK & WESTERN RAILWAY CO.

*Defendant's Bill of Exceptions No. 11.*

Be it Further Remembered, That upon the trial of this cause, after the evidence had gone to the jury (which evidence is fully set forth in Bill of Exception No. 1, which is hereby specifically referred to and made a part hereof), and after the jury had been instructed as to the law of the case (as appears from Bill of Exceptions numbered 1, 2, 3, 4, 5, 6, 7 and 8 which are hereby specifically referred to and made a part hereof), and after the argument of counsel, the jury retired to their room to consider of their verdict, and after some time, returned into Court with the following verdict:

"We, the jury, find for the Plaintiff, and fix his damages at (12,500.00).

(Signed)

L. M. WRIGHT, *Foreman.*"

And thereupon, the defendant, by counsel, moved the court to set aside the verdict and grant it a new trial, because the verdict was contrary to the law and the evidence, because the court had erred in instructing the jury as to the law of the case, and because the verdict shows that the jury did not diminish the damages on account of plaintiff's contributory negligence, but the court over-ruled said motion, and entered up a judgment in favor of the plaintiff  
542 against the defendant for the amount found by the jury in their verdict, to which action and ruling of the Court the defendant by counsel then and there excepted, and prayed that this its Bill of Exceptions No. 11 be signed, sealed and made a part of the record, which is accordingly done this 16th day of September, 1910.

HENRY C. McDOWELL, [SEAL.]

*District Judge.*

U. S. Clerk's Office, W. Dist. Va., at Lynchburg. Filed Sep. 16, 1910. Stanley W. Martin, Clerk U. S. Court.

543 *Petition for Writ of Error.*

In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST

v.

NORFOLK & WESTERN RAILWAY CO.

Now comes the Norfolk & Western Railway Company, the defendant in the above named case, and says that on or about the — day

of August, 1910, this Court entered judgment herein in favor of the plaintiff against this defendant, in which judgment and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will fully and more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the defendant prays that a writ of error with super-sedeas may issue in its behalf to the Supreme Court of the United States for the correction of the errors complained of a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said Supreme Court of the United States and that the judgment herein complained of may be reversed.

NORFOLK & WESTERN RAILWAY CO.,  
By THEODORE W. REATH,  
WOODS, JACKSON & SMITH,  
G. A. WINGFIELD,  
*Attorneys.*

U. S. Clerk's Office, W. Dist. Va., at Lynchburg. Filed Sep. 16,  
1910. Stanley W. Martin, Clerk U. S. Court.

544

*Assignment of Errors.*

In the Circuit Court of the United States for the Western District of Virginia.

D. E. EARNEST

v.

NORFOLK & WESTERN RAILWAY CO.

Comes now the defendant in this action, the Norfolk & Western Railway Co., along with its petition for writ of error and bills of exception, and files the following assignment of errors upon which it will rely, which said errors it alleges occurred during the trial of this case, to-wit:

(1). The Court erred in over-ruling the demurrers to the amended declaration, because the said declaration shows on its face that the plaintiff claimed under the act of Congress of April 22nd, 1908, known as the Federal Employers' Liability Act, which said act is unconstitutional and void for the follow- reasons:

(a). The act is not a regulation of commerce, or of commerce between the states.

(b). The act is unconstitutional in declaring a rule of liability for "Every common carrier by railroad, while engaged in" interstate commerce in favor of "any person suffering injury while he is employed by such carrier" in interstate commerce, different  
545 from the rule of liability applied to employees similarly engaged of other persons or corporations and applies to all employees without regard to the hazard of their work. The act is in violation of the Fifth Amendment of the Constitution of the United



States being an arbitrary imposition of liability without regard to the hazard of the business.

(c). The act is unconstitutional as beyond the Federal power, because it makes the carrier liable for the negligence of the intrastate employee.

(d). The act is unconstitutional, Section 5 thereof being void for the following reasons;

1. The Section is not a regulation of interstate commerce, and prescribes no rule by which either traffic, transportation or commerce is regulated.

2. The Section is class legislation.

3. The Section is an unwarrantable interference with the liberty of contract protected by the first amendment to the Constitution of the United States.

(e). The act is void, because it imposes duties upon, and gives privileges to, personal representatives not given or imposed by the laws of the states appointing them and by whom they are controlled, and it is further void because it is an infringement upon the right of the state to enact its own laws with respect to the devolution and distribution of the estate of deceased person.

546 (II). The Court erred in giving the following instruction to the jury:

"2. Until the enactment of the statute of April 22nd, 1908, an employee, such as the plaintiff was, could not recover for the negligence of his fellow-servant and the rule of law is that a fireman and engineer upon the same engine are fellow-servants.

The statute has changed that rule by providing that an injury which occurs in whole or in part from the negligence of the officers, agents, or employees, shall not exempt the railroad from liability. You are therefore to carefully inquire into the real cause of the injury. If you find from the evidence that it was through the carelessness of the engineer in failing to use ordinary care in looking out for the plaintiff or to wait for or observe a signal or indication which the jury believe he should have observed or waited for before driving the engine over the switch, the defendant is liable for his affirmative acts or omissions, and if these acts were negligent and they were the proximate cause of the injury, then the defendant is chargeable with the engineer's negligence."

The said instruction fails to qualify the instruction as to the effect of contributory negligence and that part of the instruction reading as follows: "If you find from the evidence that it was through the carelessness of the engineer in failing to use ordinary care in looking out for the plaintiff or to wait for or observe a signal or indication, which the jury believe he should have observed or waited for, \* \* \*" is erroneous because misleading and because it leaves to the jury a question of law as to the duties owed by the defendant to the plaintiff and the said instruction is also erroneous because it is based on the Act of April 22nd, 1908, which act is unconstitutional and void for the reasons stated in paragraph (1) above.

(III). The Court erred in giving the following instruction to the jury:—

"1. The Court instructs the jury that if they believe from all

the evidence in the case that the plaintiff was injured while employed by the defendant to work for it as a fireman on an engine engaged in the "pusher service" or "helper service" on its road at Northfork, West Virginia, and that he had been for several days assisting interstate trains over the grade east of Northfork, and that at the  
547 time he was injured, he was conducting or assisting in taking an engine out of the yards at Northfork and that said engine was on its way out of said yard to be coupled to a train to be pushed, by said engine, over said grade, and that said train was made up of cars destined from the state of West Virginia and other states to points in Virginia and other states, then they are instructed that said plaintiff was injured while he was employed by the railroad company in commerce between the states."

The said instruction is based on the act of Congress of April 22nd, 1908, which said act is unconstitutional and void for the reasons set forth in paragraph (1) above.

(IV). The Court erred in giving to the jury the following instruction:—

"6. Contributory negligence is the negligent act of a plaintiff, which concurring and co-operating with the negligent act of a defendant, is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress, under which this suit was brought, provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion of the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defence of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence as compared with the negligence of the defendant.

If the defendant relies upon the defence of contributory negligence, the burden is upon it to establish that defence by preponderance of the evidence."

The said instruction is erroneous, in not charging the jury that they must diminish the damages for contributory negligence and also in charging a different method of diminution from that laid down in section 3 of the act of Congress of April 22nd, 1908, and because it is based on the act of Congress of April 22nd, 1908, which  
548 said act is unconstitutional and void for the reasons stated in paragraph (1) above.

(V). The Court erred in giving to the jury the following instruction:

"9. If the jury believe from the evidence that it was necessary or usual within the knowledge of John Drawbond for the plaintiff to walk on, along or over the tracks of the defendant company, in front of the said engine while it was moving, in order to properly perform his duties of piloting said engine out of said yard, it was then the duty of the defendant company, through its engineer, in charge of said engine, to use reasonable care and caution in the management of said engine and to keep such a look out for the plaintiff as an ordinarily prudent and careful man would have done

under the circumstances, to avoid running said engine upon or over the plaintiff; and if the said engineer did not exercise such reasonable care and caution and that his failure so to do was the proximate cause of the accident, then they must find for the plaintiff."

The said instruction was not founded on any evidence in the case, there being no evidence that it was either necessary or usual to walk on, along or over the tracks of the company in front of an engine in order to properly perform the duties of piloting the engine out of the yard.

(VI). The Court erred in giving the following instruction to the jury:—

"11. That, if they find for the plaintiff, they will find for him such an amount of damages not exceeding \$20,000.00 as will fully compensate him for the suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, the loss of time that naturally and proximately resulted from the injury he suffered; and if they find that the injuries sustained by the plaintiff are permanent, that they will also find for him such damages as  
549 will fully compensate him for the suffering of mind and body, the personal inconvenience and loss of time that he will suffer in the future, subject to instruction No. 6, given for the plaintiff.

In determining this, as to the future, they will consider the plaintiff's bodily vigor and age, as shown by the evidence adduced."

This instruction intimates to the jury that they might find a verdict for \$20,000.00, though such a verdict would, upon the evidence, have been grossly excessive.

(VII). The Court erred in instructing the jury as follows:—

"13. That the duty the defendant owed to the plaintiff was to use ordinary care and caution for his protection in doing the work in which he was engaged at the Northfork yard; that is, such care as a reasonably prudent and cautious person would have exercised under the circumstances; and if the jury shall believe from the evidence that the engineer of the defendant company did not use such care as a reasonably prudent and cautious person would have exercised under the circumstances of this case, and that his failure to use such care was the proximate cause of the injury to the plaintiff, then they will find for the plaintiff."

This instruction is erroneous in failing to qualify it as to the effect of contributory negligence by the plaintiff.

(VIII). The Court erred in refusing to give to the jury the following instruction offered by the defendant:—

"11. The Court instructs the jury that the plaintiff, D. E. Earnest, in entering into the service of the company as fireman in the pusher service at Northfork, West Virginia, assumed all the risks incident to the service, the dangerous character of which he knew or reasonably should have known, as the business was conducted by the defendant company at the time of the injury, and if the jury believe  
550 from the evidence that the injury complained of by the plaintiff resulted from the risk, the plaintiff assumed and not from any negligence on the part of the engineer in charge of

the engine that struck the plaintiff, they must find for the defendant."

The said instruction is based upon the evidence in the case and properly states the law applicable thereto.

(IX). The Court erred in modifying the following instruction asked for by the defendant:—

"9. The Court instructs the jury that if they shall believe from the evidence that it was the custom and practice in the Northfork yard for the fireman to line up the switches and for the engineer to follow him at a rate of three or four miles per hour without signals, or upon signal to proceed given at switch No. 3, and if they shall further believe from the evidence that plaintiff was familiar with this custom and practice in said yard, and that, at and before the accident which resulted in plaintiff's injury, engineer Drawbond was proceeding in accordance with this custom, then they are told that the said engineer Drawbond had the right to act on the assumption and belief that the plaintiff, in lining up the switches, would take reasonable precaution for his own safety against the approaching engine, and it was not the duty of engineer Drawbond to keep a look out for him."

By striking therefrom the concluding paragraph or sentence thereof, to-wit:

"and it was not the duty of engineer Drawbond to keep a lookout for him."

Under the facts stated in the instruction and which were based upon the evidence in the case, it would not be the duty of the engineer to keep a lookout for the fireman proceeding ahead of the engine and the instruction should have been given as asked for.

551 (X). The Court erred in allowing the following testimony of D. E. Earnest to go to the jury over the objection of the defendant;

"Q. Do you know whether or not at the time the engine struck you, it was running faster than it was the last time you had seen it?"

A. Why, yes, it seemed to me that it did, that it was running faster.

Q. I will ask the stenographer to read the question to the witness, as I think he did not conclude his answer when counsel on the other side interposed objection. (Which last question was read to the witness.)

A. Yes, sir. It seemed to me it was running faster, because it seemed it pushed me a little piece on the track after it struck me."

The foregoing questions and answers give the opinion of the witness as to the speed of the train when it struck him, although he does not attempt to say that he saw the train or had any means of knowing how fast it was running. The jury could form as good an idea of the speed of the train from the facts as the witness could, and it was error to allow him to give his opinion to the jury.

(XI). There were other errors that happened during the trial of the case, which appear on the face of the record, and were made the subject of exception at the time and they are also relied upon.

552

*Bond.*

Know all men by these presents, that the Norfolk & Western Railway Company, a corporation duly chartered and organized under the laws of the State of Virginia, as Principal, and the United States Fidelity & Guaranty Company, a corporation duly organized and existing under the laws of the State of Maryland, as Surety, are held and firmly bound unto D. E. Earnest in the just and full sum of Fifteen Thousand (\$15,000.00) Dollars to be paid to the said D. E. Earnest, his heirs, executors, Administrators, or assigns, to the payment of which well and truly to be made the said Norfolk & Western Railway Company and the United States Fidelity & Guaranty Company hereby bind themselves, their successors jointly and severally by these presents.

Witness the signature of the said Norfolk & Western Railway Company, by its First Vice-President, and the corporate seal of the Company hereto affixed, attested by its Secretary, and witness the signature and seal of the United States Fidelity & Guaranty Company, by Lawrence S. Davis, its Attorney in Fact, this 15th day of September, 1910.

Whereas at a Circuit Court of the United States for the Western District of Virginia, in a suit pending in said Court between D. E. Earnest as Plaintiff, and the said Norfolk & Western Railway Company, as Defendant, a judgment was rendered against said Norfolk & Western Railway Company, and the said Norfolk & Western Railway Company having obtained a Writ of Error, and filed a copy thereof in the Clerk's Office of said Court to reverse said Judgment in the aforesaid suit, and a citation directed to the said D. E. Earnest cited and admonishing him to be and appear before the Supreme Court of the United States at Washington thirty days from the 16th day of October, 1910.

Now the condition of the above obligation is such that if the said Norfolk & Western Railway Company shall prosecute such Writ of Error to effect and answer all damages and costs if it fails to make its appeal good, then the above obligation shall be void; else to remain in full force and virtue.

553      NORFOLK & WESTERN RAILWAY COMPANY,  
By WM. C. McDOWELL,  
1st Vice-President.

[Seal of Norfolk & Western Ry. Co.]

Attest:

E. H. ALDEN,  
Secretary.

UNITED STATES FIDELITY & GUARANTY  
COMPANY,  
By LAWRENCE S. DAVIS,  
Attorney in Fact.

[Seal of United States Fidelity & Guaranty Co.]

STATE OF PENNSYLVANIA,  
County of Philadelphia, ss:

I, Harry M. Kurtz, a Notary Public in and for the County and State aforesaid do certify that Wm. G. McDowell, First Vice President, and E. H. Alden, Secretary, whose names are signed to the foregoing writing bearing date the 16th day of September, 1910, have each acknowledged same before me in my County aforesaid.

Given under my hand and Notarial seal this 16th day of September, 1910.

[NOTARIAL SEAL.]

HARRY M. KUTZ,  
*Notary Public.*

My commission expires February 27, 1913.

STATE OF VIRGINIA,  
Roanoke City, ss:

This day personally appeared before me R. J. Watson the Under-  
signed Deputy Clerk of Corporation Court in and for the City and  
State aforesaid Lawrence S. Davis, whose name is signed to the  
foregoing writing bearing date the 16th day of September 1910,  
and acknowledged the same. The said Lawrence S. Davis further  
acknowledged that he had executed the said writing as Attorney in  
Fact for the United States Fidelity & Guaranty Company, and that  
he was fully authorized to execute the said writing.

Given under my hand and seal this 24th day of September, 1910.

R. J. WATSON,  
Deputy Clerk of Corporation Court.

My commission expires — —, 191—.

554      Approved:  
HENRY C. McDOWELL,  
District Judge.

Endorsed: D. E. Earnest vs. N. & W. R. R. Co. Bond Filed  
Sept. 26, 1910. Stanley W. Martin, Clerk.

555 *Order.*

In the Circuit Court of the United States for the Western District of  
Virginia.

D. E. EARNEST

V.

NORFOLK & WESTERN RAILWAY CO.

On this — day of September, 1910, comes the defendant and presents to the Court its bills of exceptions Nos. 1, to 11, inclusive, which are signed and made a part of the record herein, and also presented to the Court its petition, praying for the allowance of a writ of error and an assignment of errors, intended to be urged by it, praying also that a transcript of the record and proceeding and papers,

upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other, and further proceedings may be had as are proper in the premises, and that the judgment of this Court be reversed. And the said defendant also presents to the Court bond in the sum of Fifteen Thousand (\$15,000.00) Dollars, conditioned according to law, with sufficient security, which bond is hereby accepted and approved by this court.

556 And Upon Consideration Thereof, the Court doth allow the writ of error to the defendant, which shall operate as a supersedeas, and it is ordered that a transcript of the record and the proceedings in the cause aforesaid be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

U. S. Clerk's Office, W. Dist. Va. At Lynchburg. Sep. 16, 1910.  
Filed. Stanley W. Martin, Clerk U. S. Court.

557 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the Honorable Judges of the Circuit Court of the United States for the Western District of Virginia, at Roanoke, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between D. E. Earnest, plaintiff, and Norfolk & Western Railway Company, defendant, a manifest error hath happened, to the great damage of the said Norfolk & Western Railway Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 15th day October 1910 next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, this 16th day of September, in the year of our Lord one thousand nine hundred and ten.

[Seal United States Circuit Court, Western District of Virginia.]

STANLEY W. MARTIN,  
*Clerk of the Circuit Court of the United  
States for the Western District of Vir-  
ginia, at Roanoke, Va.*

Allowed by  
HENRY C. McDOWELL,  
*District Judge.*



558 UNITED STATES OF AMERICA, 88:

The President of the United States to D. E. Earnest, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court to be holden at Washington, D. C. on the 16th day of October, 1910 pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Western District of Virginia at Roanoke wherein you are defendant in error and Norfolk & Western Railway Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Jno. M. Harlan, Senior Associate Justice of the Supreme Court of the United States, this 16th day of September, in the year of our Lord one thousand nine hundred and ten.

HENRY C. McDOWELL,  
*District Judge.*

Legal service of the within citation accepted this Sept. 16 1910.

D. E. EARNEST,  
By PACK, HINTON & PACK,  
THOS. L. MOORE,  
*His Attys of Record.*

559 And, Thereupon, It is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Supreme Court, at Washington, D. C. and the same is transmitted accordingly.

Teste: STANLEY W. MARTIN, *Clerk.*

UNITED STATES OF AMERICA,  
*Western District of Virginia:*

I, Stanley W. Martin, Clerk of the Circuit Court of the United States for the Western District of Virginia, at Roanoke, Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings of the Norfolk & Western Railway Company, Plaintiff in Error vs. D. E. Earnest, Defendant in Error, as appears from the records of my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Circuit Court, this 11th day of October, 1910.

[Seal United States Circuit Court, Western District of Virginia.]

STANLEY W. MARTIN,  
*Clerk United States Circuit Court, Western District of Virginia, at Roanoke, Virginia.*

Endorsed on cover: File No. 22,362. W. Virginia C. C. U. S. Term No. 153. Norfolk & Western Railway Company, plaintiff in error, vs. D. E. Earnest. Filed October 26th, 1910. File No. 22,362.

# In the Supreme Court of the United States

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OCTOBER TERM, 1910.

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No.

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NORFOLK & WESTERN RAILWAY COMPANY,  
PLAINTIFF IN ERROR,

v.

D. E. EARNEST,  
DEFENDANT IN ERROR.

---

## MOTION TO ADVANCE CASE FOR ORAL ARGUMENT.

---

Comes now D. E. Earnest and moves that this Honorable Court may advance the above entitled case for hearing on November 28, 1910, for the following reasons:

1. That the matters involved in said case concern the constitutionality of the Act of Congress approved April 22, 1908, entitled "An Act relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases."

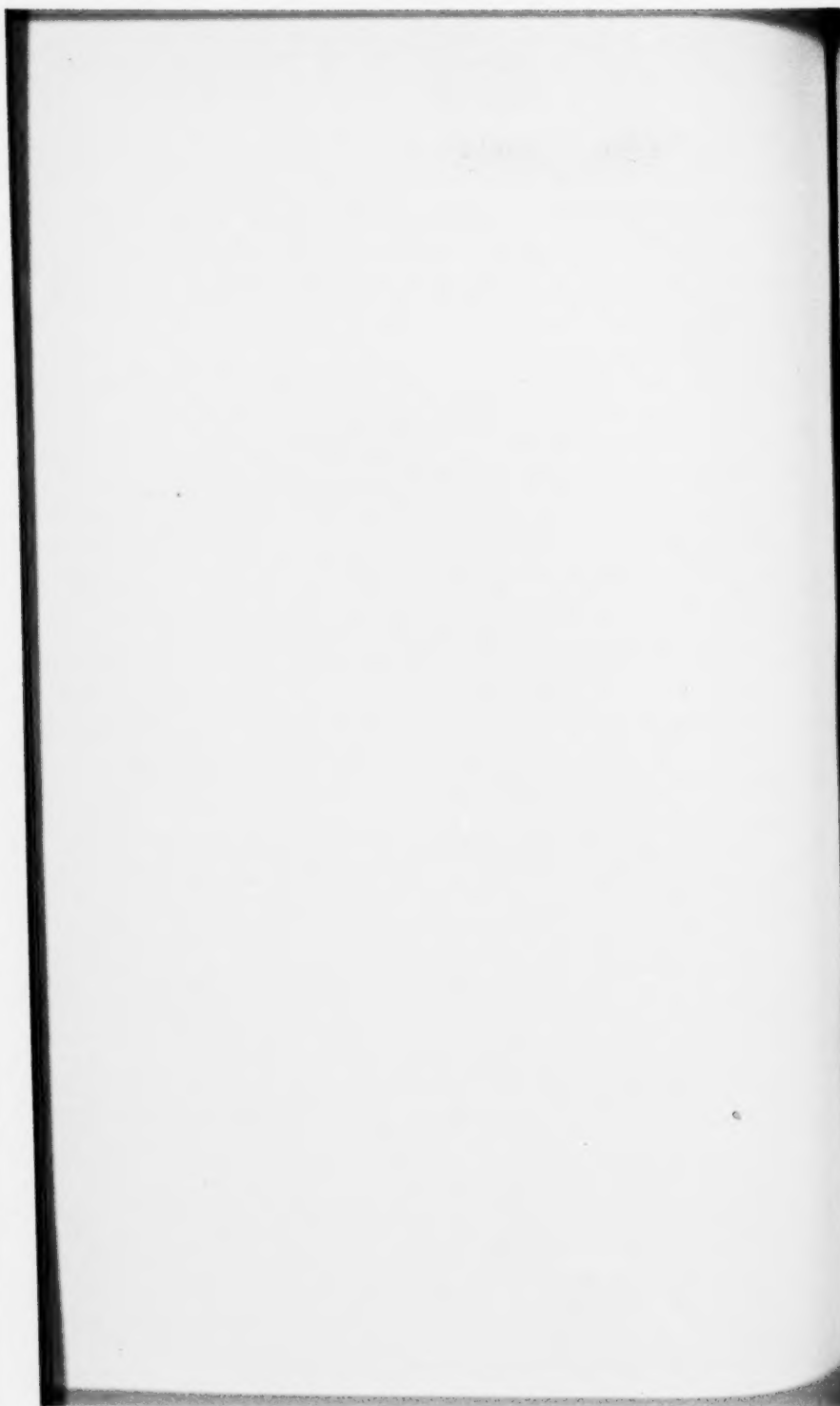
2. That this Honorable Court has advanced for oral argument on November 28, 1910, certain other cases involving the constitutionality of the said Act of Congress, some of which cases are entitled as follows: "Northern Pacific Railroad Company v. Bessie Babcock;" "New York, New Haven & Hartford Railroad Company v. Mary Agnes



Walsh, Admx.," and "Mary Agnes Walsh, Admx., v. New York, New Haven & Hartford Railroad Company."

3. That he believes that the said case entitled Norfolk & Western Railway Company v. D. E. Earnest involves the consideration of questions of law which arise in the said cases already advanced for oral argument, and furthermore involves additional questions of law arising under said Act of Congress above referred to.

HAROLD J. PACK,  
*Attorney for D. E. Earnest.*



153  
No. ~~711~~. ~~712~~

OCTOBER TERM, 1910.

Office Supreme Court, U. S.

FILED.

OCT 31 1910

JAMES H. MCKENNEY,

IN THE  
Supreme Court of the United States.

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NORFOLK AND WESTERN RAILWAY COMPANY,  
Plaintiff in Error,

vs.

D. E. EARNEST, Defendant in Error.

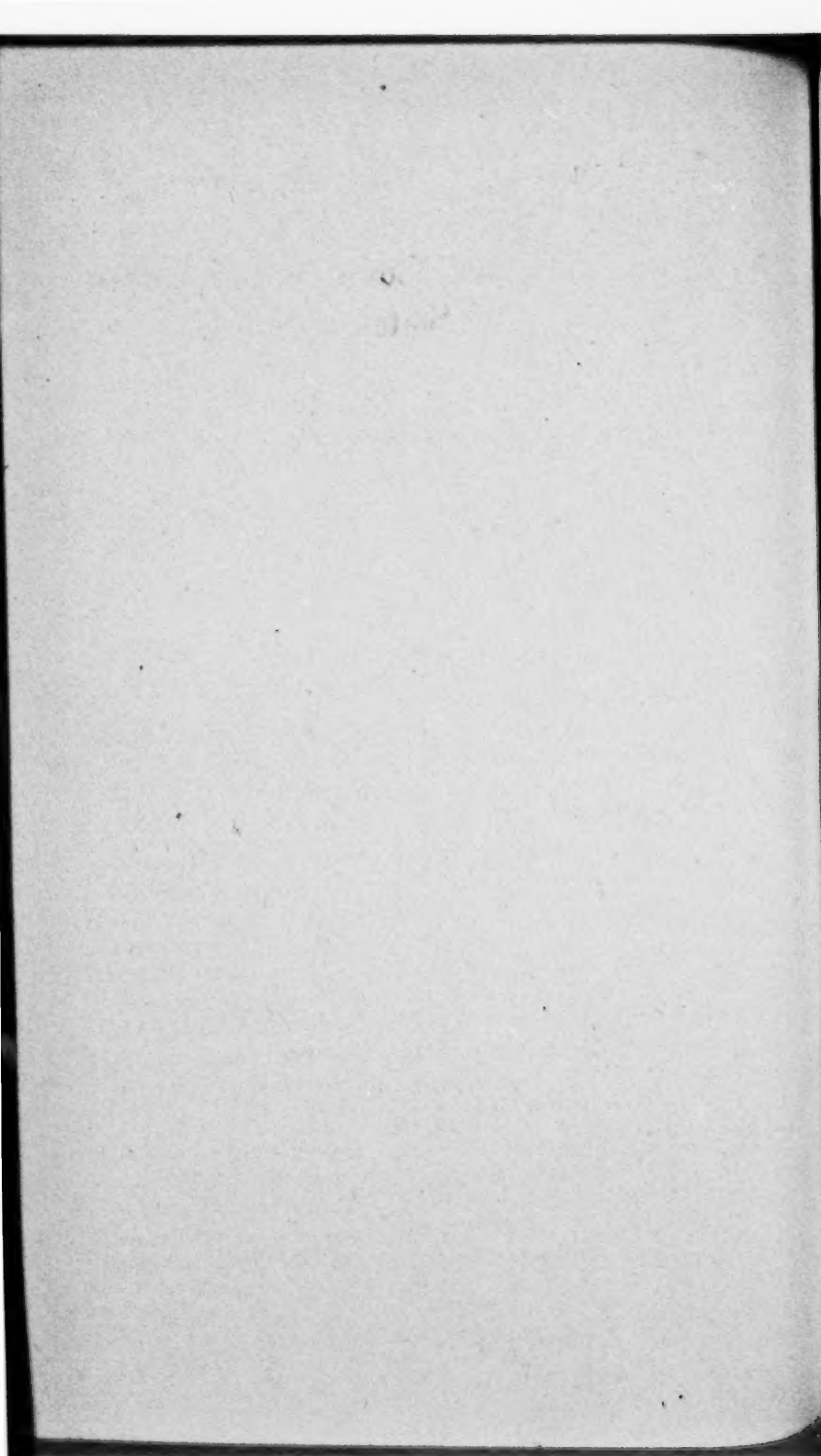
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ANSWER OF NORFOLK AND WESTERN RAILWAY COMPANY  
TO MOTION OF DEFENDANT IN ERROR TO ADVANCE CASE  
FOR ORAL ARGUMENT.

OCTOBER, 1910.

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THEODORE W. REATH,  
*Attorney for Norfolk and Western Railway  
Company, Plaintiff in Error.*





# In the Supreme Court of the United States.

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*Norfolk and Western Railway  
Company, Plaintiff in Error,*

vs.

*D. E. Earnest, Defendant in  
Error.*

October Term, 1910.

No. 741.

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## ANSWER OF NORFOLK AND WESTERN RAIL- WAY COMPANY TO MOTION OF DEFENDANT IN ERROR TO ADVANCE CASE FOR ORAL ARGUMENT.

It is true, as stated in the motion to advance this case for oral argument, that the other cases described in the motion have been advanced for oral argument November 28, 1910, and that such other cases do involve a constitutional question as to the Employers' Liability Act of Congress, approved 22 April, 1908, which is also presented *inter alia* in the case at bar, but the plaintiff objects to the granting of the motion and objects to the oral argument of this case with the others set for the 28th of November, 1910, because:

(a.) The other questions of the construction of the Employers' Liability Act and still other questions which are involved in this case are not, so far as the plaintiff in error is advised, involved in or presented by the issues and records in the cases which have been advanced and

set for oral argument November 28, 1910. The questions presented by the record in this case other than the constitutional question are quite as important to the plaintiff in error as the constitutional question and will require thorough and separate presentation to the Court in oral argument. To present these points in the midst of a constitutional argument would be unfortunate for the other cases and, it is submitted, unfair to the plaintiff in error in this case;

(b.) Only confusion can come from attempting to present as one case several cases which have but one common element, the constitutional question. The case at bar, as candidly conceded in the motion to advance "involves additional questions of law arising under said Act of Congress," and involves also still other questions, which additional questions deserve and should receive separate oral argument and consideration.

(c.) If defendant in error desires to participate in the argument of the constitutional question he should do this not by advancing this case out of orderly procedure but rather by having his counsel seek to intervene as *amicus curiae* by obtaining permission of the court to that end in the pending cases which have already been advanced to the 28th of November, 1910, for oral argument.

It is, therefore, prayed that the motion to advance be denied.

THEODORE W. REATH,

*Attorney for Norfolk and Western Railway Company,  
plaintiff in error.*

OCTOBER 31, 1910.

DEC 20 1912

JAMES H. MCKENNEY,

CLERK.

No. 153.

OCTOBER TERM, 1912.

IN THE  
Supreme Court of the United States.

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NORFOLK AND WESTERN RAILWAY COMPANY,  
Plaintiff in Error,

vs.

D. E. EARNEST, Defendant in Error.

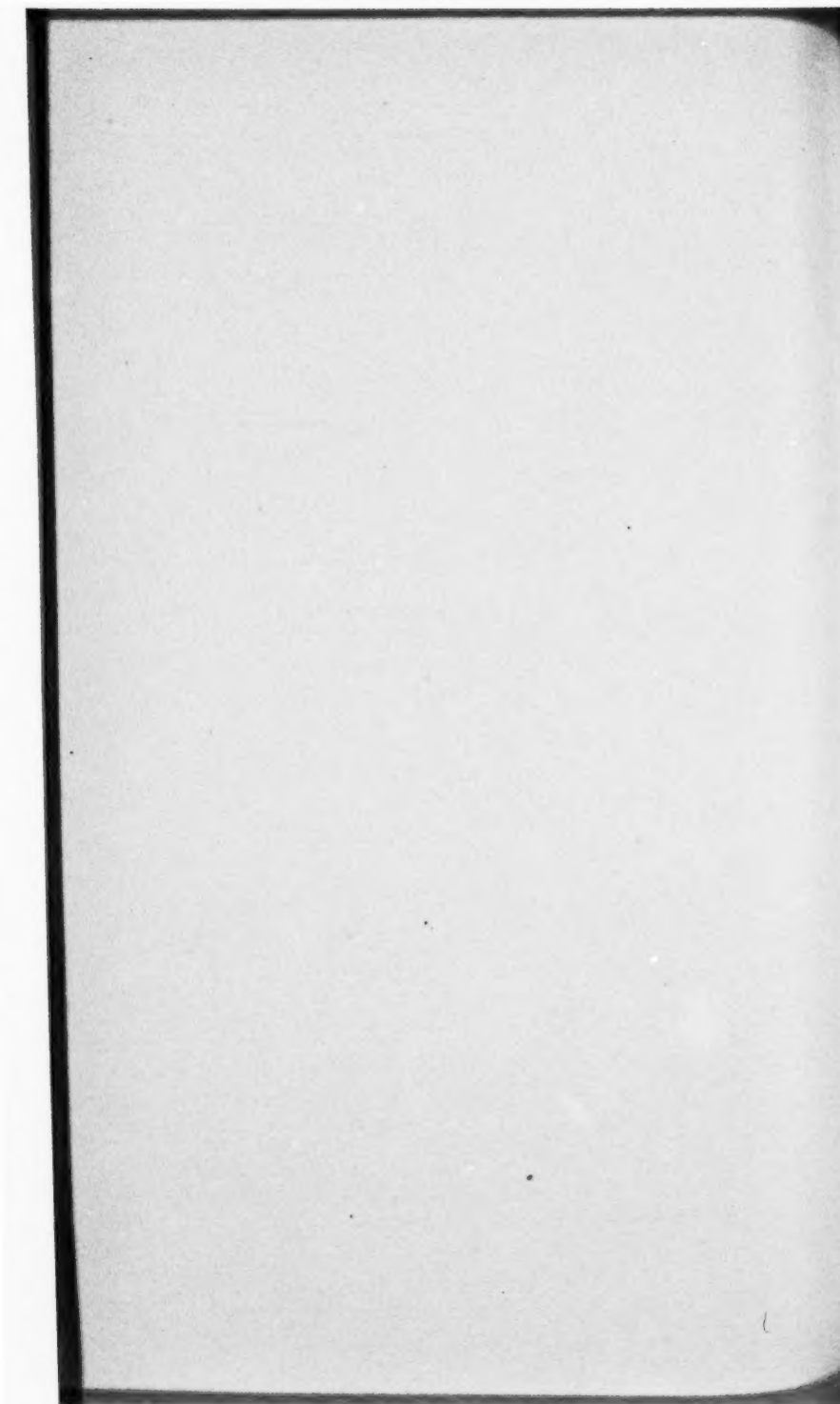
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BRIEF OF ARGUMENT FOR NORFOLK AND WESTERN RAIL-  
WAY COMPANY, PLAINTIFF IN ERROR.

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ROY B. SMITH,  
JOHN H. HOLT,  
THEODORE W. REATH,  
*Counsel for Norfolk and Western Railway  
Company, Appellee.*

DECEMBER, 1912.



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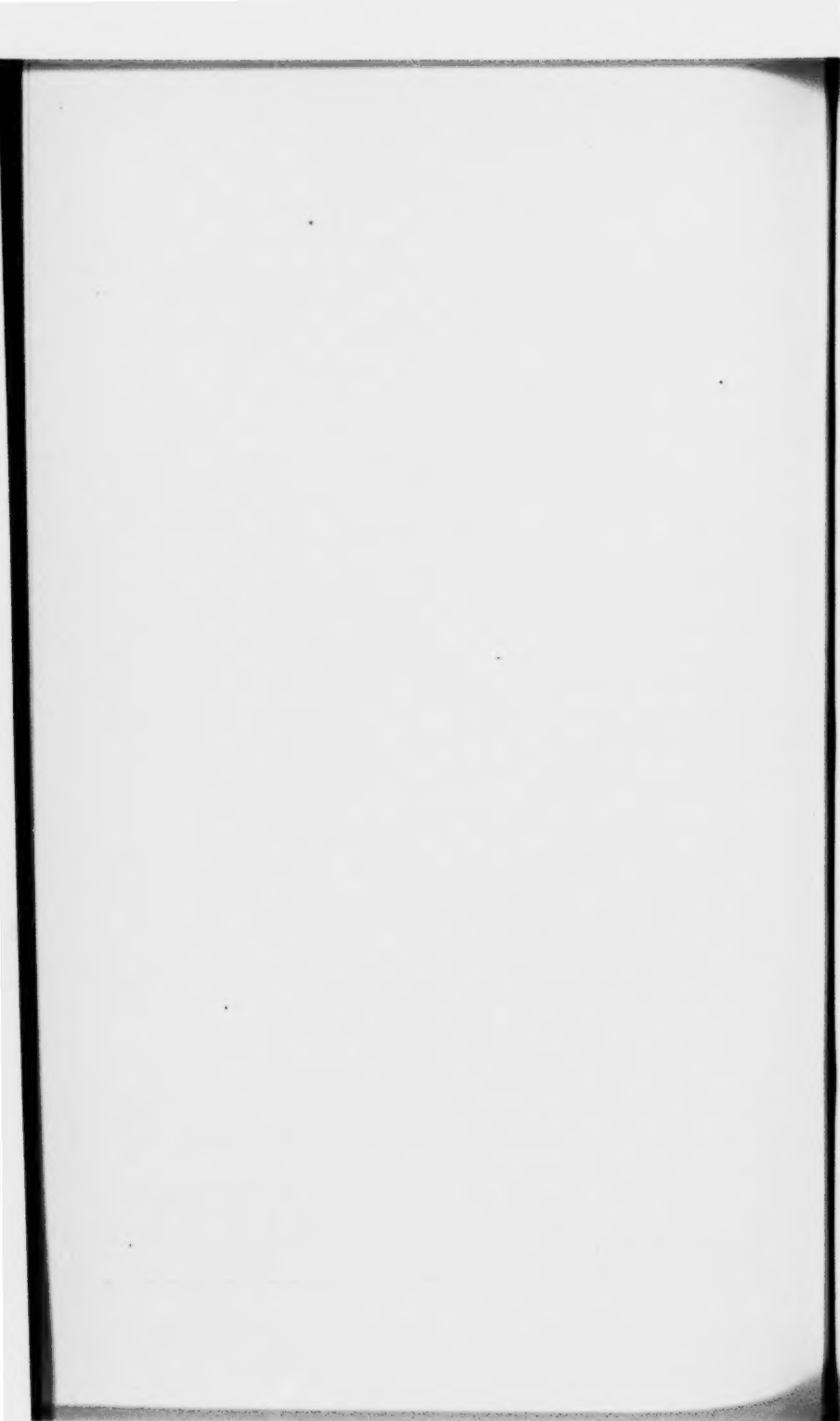
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In the Supreme Court of the United  
States.

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OCTOBER TERM, 1912. No. 153.

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*Norfolk and Western Railway Company, Plain-  
tiff in Error,*

VS.

*D. E. Earnest, Defendant in Error.*

---

BRIEF OF NORFOLK AND WESTERN RAIL-  
WAY COMPANY, PLAINTIFF IN ERROR.

---

I.

STATEMENT OF THE CASE.

D. E. Earnest was a Fireman employed by the Norfolk & Western Railway Company, and had been so employed for three years and eight months prior to February 13th, 1909, when he

was run over by an engine and lost his right leg in the North Fork Yard, at Switch No. 2. The action was to recover damages for the injury so received.

A diagram of North Fork Yard is inserted in the printed record between pages 126 and 127. The main line of the railroad at this point consisted of a double track, and North of the main line were a number of tracks designated as the "North Fork Yard." The first track North of the main line track was called "track No. 1," the next "No. 2," the next "No. 3," and so on. Connecting these yard tracks to the main line tracks is what is called a "lead" or "ladder" track shown in the diagram as commencing North of the east end of the station and going in a westerly direction to the North side of the yard and connecting with all the different tracks by switches. The switch leading into track No. 1 was called "Switch No. 1," and track No. 2 "switch No. 2" and track No. 3 "switch No. 3" and so on. The grade of the main line of the railroad coming East is heavy for some distance, and heavy trains are shoved or pushed up that grade by engines that come out from the North Fork yard after such trains have passed North Fork and couple to their rear. After the trains have been pushed over the grade, these engines uncouple and return to North Fork yard.

Such engines are called "pusher engines" and the work they are engaged in "pusher service." A number of engines with their crews are kept at North Fork yard for this service. The crew of each such engine consists only of the engineer and fireman.

Engine No. 893 was one of these engines, and its crew was John Drawbond, Engineer, and D. E. Earnest, Defendant in Error, Fireman. This crew was required to report for duty on the night of the accident at 11 P. M. to push train No. 82, coming East, over the grade.

This engine was standing on track No. 3 just East of the coal wharf marked "coaling station" on diagram, heading east. To go east from that point and to pass out to the east bound main line track the engine would have to pass through switch No. 3 to get on to the lead track and then following lead track it would pass over in the order mentioned, switches No. 2 and 1, and the west bound main line switch and through the east bound main line switch to the east bound main line track.

The custom was when a pusher engine was to be brought out from this yard for the Fireman to act as switchman, and go ahead of the engines and see that all switches were lined up properly, and change any not lined up properly for the engine to pass through, and for the engineer to run

his engine and follow very slowly after the fireman. This custom was being followed at the time of the accident. Defendant in Error claimed that the custom was to wait for a signal before running through switches, but we shall explain the evidence on this point later.

The switch levers were located on the Fireman's side when the engine was headed East, and to set the switches the fireman had only to leave his engine, and go forward without crossing or going upon the track. There was no one present but D. E. Earnest and John Drawbond when the accident happened. The engine was standing on track No. 3 when it started, just east of the coal wharf, a small portion of its tender under the coal wharf and its pilot was not probably over 240 feet west of switch No. 3: switch No. 2 was only 130 feet further east.

The engine, in starting, proceeded slowly, not faster than a man could walk, not over four miles per hour. This is the uncontradicted evidence in the case. Within 125 yards from where it started Earnest was run over.

The following is the first account Earnest gave of the accident upon the witness stand (Transcript, page 36):—

“He (meaning John Drawbond, the engineer) got up on his engine and asked me if I was ready. I told him yes, I had everything

ready. He started, and I jumped down off the engine and ran to the left side and went to switch No. 3, and throwed the switch, and crossed over and waived him ahead. Then I went on up the track to examine the other switches. Before I got switch No. 2 examined I was caught by the engine. Q. Well, tell us all you remember about that, how you were caught by it. A. Well, it was supposed I stepped in a hole where they had cleaned out for the switch bars to work across in between the ties. It was supposed I stepped in the hole and fell, but I am not positive about it, whether I stepped into the hole or not. I can't remember about falling. All I can remember of was that I was under the engine, and it seemed to me as if there was something pushing me along, and I hollored as well as I remember three times. The engineer heard me I suppose the third time, and he come down and asked me what was the matter. I told him he had killed me, that I was killed. I had this leg (right) run over right there (pointing just about or below the knee), and the engine was on that (the left) heel. I told him he had killed me and to back up, that he had my feet fast. He called me Dave, and he said 'Oh, wait a minute Dave,' and he took hold of my heel to see if it was fast under the wheel, and he couldn't pull it out, and he got up and backed his engine off of me. Then he come down and seen what he

done, after he come down there. But immediately afterwards he said he would go up to the office and get some help, I remember he said, and then he came down with some help, and they carried me up to the telegraph office."

We shall now state the essential facts in proof, with page references to the Transcript of Record, indicating in the statement those matters in respect of which the evidence is uncontradicted and also those matters as to which there is any conflict.

Earnest was carrying a torch which was burning all right (Transcript, page 66); he went from switch No. 3 to switch No. 2 walking between the rails of the same track along which his engine was coming (Transcript, page 38) because (Transcript, page 40) "it was a better place to walk. The yard, or a heap of it, had things laying on it so you couldn't get over it, covered with ashes, coal and other stuff. In between the track it was clean and I could get along in there better." But there was a path along the outside of this track between these switches. Drawbond his engineer testified (Transcript, pages 131-132) "it is a good big path. People use it that live there on the hill," "it is smooth path all right, level as the railroad." Gordon another engineer for the de-



fendant corroborates this (Transcript, page 215), and Earnest does not deny the existence of the path, but merely makes the statements above quoted that between the rails he could "get along" better, &c.

Earnest testified (Transcript, page 43) that at switch No. 3 the engine was running "very slow." Drawbond, the engineer, said, (Transcript, page 128) "I wasn't exceeding four miles an hour;" "a man could have walked and kept ahead of me." Earnest testified he was going at a trot between switches 3 and 2, faster than the engine (Transcript, page 43); that when he last saw the engine it was at switch No. 3. The distance between switch No. 3, and switch No. 2 is 130 feet (Transcript, page 127). He further testifies (Transcript, page 68) that "just before I set switch No. 3 or just afterwards and I don't remember which it was." "I saw train No. 82 coming by, and saw the fireman of train No. 82," and "I kinder threw my torch up that way (indicating), and I waved at him;"—(Transcript, page 45). Train No. 82 was an east bound freight on the main line some 100 feet off (Transcript, page 45). Earnest says also (Transcript, page 45) that the fireman he refers to was Will Ingram on the head engine; but that (Transcript, page 69) his own brother was fireman on the rear engine of

the same train, although he testifies that he did not know it at the time. Wright, engineer of the rear engine of train 82, for whom Earnest's brother was fireman, saw a man waving his torch up and down somewhere near No. 2 switch, this being the switch at which Earnest was injured. As near as Wright could tell the man was standing on the track (Transcript, page 244). Earnest's engine was under orders to overtake and push Wright's train No. 82.

Earnest further testified that he came to No. 2 switch and was examining the needle points of the switch with his torch when he was caught by the engine (Transcript, pages 67-8); he stood with his back to his approaching engine and between the rails to examine the needle points. The yard was lit by electric lights, the nearest of which was 15 or 20 feet away (Transcript, page 192). He testified that the *easiest* way to see how the switch was turned was to look at these needle points (Transcript, page 40); "they were worn bright on the top where the engines had run over them, and the light would shine on them and I could see them better than I could the lever in the other way." On Transcript, pages 67-68—cross examination—when asked "Do you mean that you had to put your torch down near the rail?" he answered "yes,

sir; to see it good. Q. You couldn't see couldn't see that rail without putting your torch down near it? A. Not well, no sir." Earnest's brother (Transcript, page 88) testified that most needle points are worn until they are bright but on Transcript, page 95, said that even with a torch "on dark nights sometimes you have to be right up at it."

Neither Earnest nor his brother gave any reason why plaintiff was *between* the rails in a position of danger instead of *outside* in safety, and no reason was given for his not ascertaining the position of the switch by examining with his torch the lever *outside* the rails.

The Railway Company's testimony shows that the way the switch was thrown under such circumstances might be seen from 50 to 75 feet off. To this effect Harrison, yardmaster at (Transcript, page 182) North Fork. McDaniel, an engineer, testified (Transcript, pages 203-4) you can see the switches "a right smart piece" and "in plenty of time to have stopped the engine." Gordon, a fireman (Transcript, page 215) said, it was not difficult to see the lever, especially at this spot. Jackson, a fireman, said there was "no difficulty in seeing the switch by the light given there at North Fork yard," "you could see that switch 50 or 75 feet, all of that distance," (Transcript, page 222). Gordon, a fireman (Transcript,

page 214) when asked what length of time it took for the fireman to line up switches down through that yard, replied, "Well, it wouldn't take him but just ordinary walking along. He wouldn't have to stop hardly at a switch," "all he would have to do is to reach down and turn it over and go on."

Earnest testifies (Transcript, page 36) "before I got switch No. 2 examined I was caught by the engine," "I hollered as well as I remember three times." The engineer stopped in about 4 feet 7 inches and jumped to the ground; Earnest's right leg had been so badly crushed below the knee that it had to be amputated above the knee, and the left heel of his shoe was caught under the right hand wheel of the forward or pony truck of the engine. The engineer backed his engine to release Earnest.

Earnest testifies that the engineer should not have driven his engine forward to No. 2 switch without receiving affirmative signal to go ahead (Transcript, page 38).

And his brother John W. Earnest, testified to the same effect (Transcript, page 86); also Emmet Hall an engineman (Transcript, pages 111-112). The witnesses for the Railway Company show that in such a yard as this under such circumstances no signal to proceed is either customary or necessary; that the engineer should pro-

ceed slowly under such circumstances unless signalled to stop. See the evidence of:

Jackson, fireman, Transcript, page 222;  
McDaniel, engineer, Transcript, page 201;  
Harrison, yard master, Transcript, page 183;  
Drawbond, engineer, Transcript, page 133;  
Gardner, engineer, Transcript, page 230;  
Wright, engineer, Transcript, page 243.

The engineer, **Drawbond**, testified that after he left switch No. 3 he did not see Earnest because of the steam escaping from the open cylinder cocks of his engine (Transcript, page 132); that it was always necessary for these cocks to be open in order to drain the cylinder when an engine has been standing any time, otherwise there was danger of "knocking the cylinder heads out of the engine," (Transcript, page 133). No witness contradicted Drawbond, as to this. To the same effect, Gardner, engineer, (Transcript, page 230).

The engineer, Drawbond, testified (Transcript, page 129) as to the statement made by fireman Earnest touching the cause of his injury immediately after the injury occurred:

"After I got him off the rail he said that he was walking along there looking to wave at his brother on 82. He also said he didn't censure me with the accident."

Fireman Earnest testified at Transcript, page 47 that he remembered telling Drawbond not to worry about the accident, "that possibly I was in fault," and at page 48 "I don't remember what all I did say to him about it."

All the other witnesses at the scene of the accident testified in corroboration of the engineer Drawbond that fireman Earnest stated the fault to have been his own.

The jury found a verdict for Earnest for \$12,500 upon which judgment was entered, and the present writ of error has been allowed to review the same.

---

## II.

### SPECIFICATION OF ERRORS.

There are eleven assignments of error but Nos. I, II, III, V, VII, X and XI will not be pressed. A specification of the errors relied upon is as follows:

#### *Assignment of Error IV:*

The Court erred in giving to the jury at the instance of the defendant in error the following instruction:

"6. Contributory negligence is the negligent act of a plaintiff, which concurring and co-operating with the negligent act of a defendant, is the proximate cause of the in-

jury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress, under which this suit was brought, provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion of the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defence of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence as compared with the negligence of the defendant.

If the defendant relies upon the defence of contributory negligence, the burden is upon it to establish that defence by preponderance of the evidence." (Transcript, page 282.)

This instruction is erroneous in not charging the jury that they *must* diminish the damages for contributory negligence: and also in charging a different method of diminishing from that laid down in Section 3 of the Act of Congress of 22 April, 1908.

#### *Assignment of Error VI:*

The Court erred in giving to the jury at the instance of the defendant in error the following instruction:

"11. That, if they find for the plaintiff, they will find for him such an amount of dam-



ages not exceeding \$20,000.00 as will fully compensate him for the suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, the loss of time that naturally and proximately resulted from the injury he suffered; and if they find that the injuries sustained by the plaintiff are permanent, that they will also find for him such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience and loss of time that he will suffer in the future, subject to instruction No. 6, given for the plaintiff.

In determining this, as to the future, they will consider the plaintiff's bodily vigor and age, as shown by the evidence adduced." (Transcript, page 283.)

This instruction was erroneous in intimating to the jury that they might find a verdict for \$20,000.00, though such a verdict would upon the evidence have been grossly excessive.

*Assignment of Error VIII:*

The Court erred in refusing to give to the jury at the instance of the plaintiff in error the following instruction:

"11. The Court instructs the jury that the plaintiff, D. E. Earnest, in entering into the service of the company as fireman in the pusher service at Northfork, West Virginia, assumed all the risks incident to the service, the dangerous character of which

he knew or reasonably should have known, as the business was conducted by the defendant company at the time of the injury, and if the jury believe from the evidence that the injury complained of by the plaintiff resulted from the risk, the plaintiff assumed and not from any negligence on the part of the engineer in charge of the engine that struck the plaintiff, they must find for the defendant." (Transcript, pages 283-4.)

*Assignment of Error IX:*

The Court erred in modifying the following instruction asked for by the plaintiff in error:

"9. The Court instructs the jury that if they shall believe from the evidence that it was the custom and practice in the Northfork yard for the fireman to line up the switches and for the engineer to follow him at a rate of three or four miles per hour without signals, or upon signal to proceed given at switch No. 3, and if they shall further believe from the evidence that plaintiff was familiar with this custom and practice in said yard, and that, at and before the accident which resulted in plaintiff's injury, engineer Drawbond was proceeding in accordance with this custom, then they are told that the said engineer Drawbond had the right to act on the assumption and belief that the plaintiff, in lining up the switches, would take reasonable precaution for his own safety against the approaching engine,

and it was not the duty of engineer Drawbond to keep a lookout for him." (Transcript, page 284.)

By striking therefrom the concluding paragraph or sentence thereof, to-wit:

"And it was not the duty of engineer Drawbond to keep a lookout for him."

The instruction was based on the evidence and if the facts were found as stated in the instruction there would be no duty on the part of the engineer to keep a lookout for the fireman proceeding ahead of the engine. The modification was error and the instruction should have been given as asked for.

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### III.

#### ARGUMENT.

1. Plaintiff's Instruction No. 6 was erroneous (a) in not charging the jury that they *must* diminish the damages for contributory negligence and (b) in requiring the jury to find a proportion between the negligence of the employe as compared with the negligence of the Company.

#### *(Assignment of Error IV)*

Plaintiff's instruction No. 6 (Transcript, page 270), was in full as follows:—

"Contributory negligence is the negligent act of a plaintiff which concurring and co-

operating with the negligent act of a defendant is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the Act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defence of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence as compared with the negligence of the defendant.

If the defendant relies upon the defence of contributory negligence, the burden is upon it to establish that defence by a preponderance of the evidence."

This instruction was based upon Section 3 of the Act of Congress known as the Employers' Liability Act approved 22 April, 1908 (Statutes at Large, Vol. 35, Part 1, Chapter 149, Section 3, page 66), as follows:

"SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where

such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

That part of this assignment which relates to the constitutionality of the Employer's Liability Act upon which this action was based is no longer of any force, in consequence of the fact that this Court has since said assignment was made held the Act to be constitutional. This does not affect the jurisdiction of this Court over the other questions in the case (*Williamson vs. U. S.*, 207 U. S. 425), but the assignment will be curtailed and confined to the misdirection by the trial Court upon the subject of contributory negligence.

*Preliminary question of Practice.*

There is a preliminary question before reaching the merits of the instruction.

The Judge in the Circuit Court in overruling motion for new trial said of this instruction:

"Plaintiff's instruction No. 6 was, within my distinct recollection, not objected to on either of the grounds of objection now asserted." (Transcript, page 33.)

We must first meet this technical objection. The record, in the usual form, shows no ground stated for the objection to the instruction, thus:

“Objected to. Given.” (Transcript, page 23.)

And in the defendant's bill of exceptions No. 3, after quoting in full plaintiff's instruction No. 6, the bill concludes:—

“To the giving of which instruction the defendant by counsel objected; but the court overruled said objection and gave the said instruction to the jury, to which action and ruling of the Court in giving said instruction No. 6 to the jury, the defendant, by counsel, then and there excepted, and tendered this its bill of exceptions No. 3, and prayed that the same may be signed, sealed and made a part of the record, which is accordingly done, this 16th day of September, 1910. Henry C. McDowell (Seal) District Judge.” (Transcript, page 270.)

The record follows the usual practice in noting the objection and exception without stating any reason. Nothing in the rules of the Circuit Court prescribe other requirements: *L. & N. R. Co. vs. McClish*, 115 Fed. 268 (C. C. A., 1902). Exception cannot be taken to the general charge: see

case last stated. The only proper method of excepting to a specific instruction which embodies as does No. 6 on point of law is without stating reasons.

We have not here an exception to an instruction based on a specific ground stated of record and an attempt to shift that ground in an appellate court: *N. P. R. R. vs. Krohne*, 86 Fed. 230 (C. C. A., 1898). Nor have we a case where no exceptions were taken in the trial court: *P. C. & St. L. R. Co. vs. Heck*, 102 U. S. 120. On the contrary, we have a case in which, informally, and not of record, a ground of objection was suggested (the then supposed unconstitutionality of the Employers' Liability Act) and on motion for new trial and before the case had passed from the control of the Circuit Court the same reasons for the objection were presented as are now pressed but were overruled.

If this court ought not to review the error of the Circuit Court in granting plaintiff's instruction No. 6, this must be because of an estoppel by which before the case passed from the control of the Circuit Court the failure to advance the reasons now presented for objection to the 6th Instruction prevented the plaintiff's counsel from having an opportunity to answer or controvert and the Court from considering those reasons. As was said by Beck, C. J., in *Bond vs. The Wa-*



bash, St. Louis & Pacific Ry. Co., 67 Iowa 712, (1885):—

“We will not consider points not made in the courts below and in this court; but this rule does not extend to reason upon which points may be sustained. We are not bound to follow the reasons of parties or counsel. We may discard all their reasons, and support their objections or positions upon the true grounds, even if they have not rested upon them.”

*Stein vs. Ashby*, 30 Ala. 363 (1857);

*Farmers, &c., Bank vs. Wilka*, 102 Iowa 315 (1897);

*Davis vs. M. K. & T. R. Co.*, 43 S. W. 44 (Texas Civil App. 1897);

*Kansas City Southern Ry. Co. vs. Williams*, (Texas Civil App., 1908), 111 S. W. 196;

*Weatherford Machine & Foundry Co. vs. Pope*, (Texas Civil App., 1910), 132 S. W. 503.

*Powers vs. Rieser*, 121 N. Y. Supp. 933 (1910);

*DeFord vs. Johnson*, (Mo. App., 1911), 133 S. W. 393.

This Court, in an opinion by Mr. Chief Justice Waite, in *P., C. & St. L. Ry. Co. vs. Heck*, 102 U. S. 120 (*supra*), covered the practice thus:

“It does not appear from this record that any exceptions were taken in the progress

of the trial to what was done by the court below. The trial was finished and a verdict rendered on the 28th of November. Nearly three weeks afterwards, a motion was made for a new trial, because of certain alleged errors in the charge; but it is nowhere shown that these errors were noted or brought to the attention of the court before the verdict. Certainly no exceptions were taken. A trial court may, in the exercise of its judicial discretion, grant a new trial, if convinced that its charge was wrong, even though its attention was not called to the error complained of before the case was finally submitted to the jury. But not so with us. Our power is confined to exceptions actually taken at the trial. The theory of a bill of exceptions is that it states what occurred while the trial was going on. Time is usually given to put what was done into an appropriate form for the record; but, unless objection was made and exception taken before the verdict, no case is presented for a review here of the rulings at the trial."

We come now to the merits of the instruction itself:

*The jury were not instructed that they must diminish the damages.*

(a) Observe that this statute is mandatory and requires that the damage "shall be diminished by the jury."

In the preliminary recital of Instruction No. 6 the court correctly stated that the Act of Congress provided that the "damages shall be diminished by the jury in proportion to the amount of contributory negligence attributable to such employe" and, if the instruction stopped here it would be free from error. But proceeding to apply the 3rd Section of the Act to the case the court went on, (Transcript, page 270):—

"So if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages" etc.

To say to the jury that contributory negligence "goes by way of diminution of damages" is not equivalent to saying that the jury *shall* or *must*, or some equivalent mandatory word, diminish the damages. The earlier and correct part of the instruction was injured, if not destroyed, in its practical effect upon the jury by the use of the words "goes by way of diminution of damages," instead of mandatory words required by the statute. The latter part of Instruction No. 6 was the part to which the jury had a right to look for guidance, for in this part of the court applied the Act to the case in hand.

We refer to Nashville & Chattanooga R. R. Co. *vs.* Nowlin, 1 Lea (Tenn.,) 523, (1878). A judgment for the plaintiff was reversed, for error thus stated, pages 524-525:—

“If his Honor, the Circuit Judge in this case, had said nothing upon this subject” (contributory negligence) “to the jury, and had not been requested to say anything, it could be said that there was no error; but having undertaken to instruct the jury upon this subject, it was his duty to declare the law correctly. The only reference to this subject in his charge is in the closing paragraph, and is as follows: ‘The negligence of the person, in all cases, can be looked to in mitigation of the damages or the amount of recovery.’ That is to say, the jury can look to it if they choose or they may not.

“If the law be, as we do declare, that contributory negligence upon the part of the plaintiff entitled the defendant as a matter of right to have such considered by the jury in reduction of damages, then it was the duty of the Circuit Judge to say to the jury, (after first explaining what conduct upon the part of the plaintiff constituted contributory negligence), that if they found that the plaintiff was guilty of such negligence at the time of the accident, then it was their duty to look to it in assessing his damages, and augment or diminish the same according as they found his negligence to be slight or gross.”

*The jury was instructed upon the erroneous rule of comparative negligence.*

(b) This instruction charged the jury that contributory negligence is "by way of diminution of damages in proportion of his negligence as compared with the negligence of the defendant." But the statute requires the jury to diminish the amount in proportion to the amount of negligence attributable to such employe *without regard to the amount of negligence of the defendant*. "Proportion" is a general word with a variety of meanings. When such a word is used in a statute we are required to look to the purpose of the statute and the context. The word is used in one of its general meanings to describe a part or share of the total damage which must be attributed to the employe for contributory negligence. No other negligence than that of the plaintiff is to be considered in diminishing his total damage because Section 3 is limited to one thing, namely, the requirement that the damages shall be diminished in proportion to the amount of negligence attributable to the employe.

One of the meanings of the word "proportion" (32 CYC, 681) is "equal or just share." The use of the word "proportion" is not intended to establish a mathematical rule to govern that which is not and never can be mathematical. The mathematical meaning of proportion is only one of

the meanings in which that word is used. In Murray's New English Dictionary we find under the definitions of the word "proportion" this as the first of the general use definitions:

"I. In General Use.

"1. A portion or part in its relation to the whole; a comparative part, a share; sometimes simply, a portion, division, part."

This is one of the primary meanings of this word as given by Murray, and the mathematical meaning is not stated until seven or eight other meanings have been given after this one.

In short, the word "proportion" has no definite and well ascertained legal meaning. Two of the noted Law Dictionaries: Bouvier (1897) and Anderson (1889) do not give the word at all. Hence we must look to the context in which and the purpose for which we find the word used in order to determine its meaning in a particular instance, or, as was said by Mr. Justice Harlan in *Burton vs. U. S.*, 202 U. S., 344 (1906), at page 371:—

"The word 'interested' has different meanings, as can be readily ascertained by examining books and the adjudged cases. 4 Words & Phrases Judicially Defined, 3692; Stroud's Judicial Dictionary, 399. But its meaning here is to be ascertained by considering the

subject matter of the statute in which the word appears.”

No direction is contained in this statute that the negligence of the plaintiff shall be compared with the negligence of the defendant: nor is the statute a declaration of that rule of law devised by a few common law courts and known as comparative negligence—a rule which introduced confusion and uncertainty. Not only is no comparison between the degrees of neglect of the two parties required by the statute but the Section *nowhere mentions the negligence of the carrier.*

The problem attempted to be solved by the statute is not a problem of mathematics or susceptible of mathematical treatment. Moreover, it is not necessary to consider or determine the part of the damages attributable to the fault of the carrier. All that is needed is to arrive at the total damages by considering, in a death case for instance, the life expectancy of the plaintiff, his health, his earning power, the beneficiaries and the amount of their dependence, and the other factors of damage; or, in the case of an injured employe, the nature and extent of his injury—whether permanent or otherwise, his pain, suffering, medical expenses, surgical expenses, loss of time, etc. By a combination of all of these ele-

ments the jury is enabled to arrive at the net amount to which the employe would be entitled *if he had not been contributorily negligent*. But if there is evidence of contributory negligence the court should instruct the jury that the jury must diminish the total damages by that amount of the damages attributable to the negligence of the employe. If, for instance, the jury should find the contributory negligence to be gross the jury might give the plaintiff nothing but his loss of wages, as was done by the Admiralty Court in the *Max Morris*, 24 Fed. 860, affirmed generally 137 U. S. 1. In that case the costs were divided and the libellant, whose collar bone had been broken and who had been disabled from work for about three months and suffered some drawbacks from the injury which would probably be permanent, was allowed \$2.00 a day for 75 working days, or \$150.00 in gross, less, however, a small balance of costs against him (24 Fed., page 864—opinion of Judge Brown in the District Court).

If the theory of comparison between the two neglects is introduced we shall have an attempt to compare in some vague, but supposedly mathematical way, two things which are in their very nature different and not comparable in any practical way. The carrier furnishes a defective appliance and the servant, knowing of the defect, carelessly uses the appliance—how



shall a jury determine by mathematical apportionment the relation between the two neglects so as to form a proportion? Instances might be multiplied showing the impossibility of any orderly administration of a law under such a theory of the statute as would require a comparison of the two neglects. But if only one neglect—that of the plaintiff—need be considered, and if no other thing need be done than to decide how much the total damage must in fairness and equity be reduced by that one neglect, then the jury has some guidance from the court by the instruction and will be able to make some fair allowance on account of contributory negligence against the total recovery.

The report, dated April 4th, 1908, of Mr. Sterling, from the Committee of the Judiciary of the House of Representatives (60th Congress, First Session, Report No. 1386) to accompany H. R. No. 20310, which Bill was so far as the 3rd Section is concerned, the same as the Act of Congress of 22 April, 1908, quoted authority, at page 5 of the report, to the effect that the 3rd Section "is substantially an adoption of the admiralty rule, which is certainly nearer ideal justice, if juries could be trusted to act upon it," this being a quotation from Shearman & Redfield.

The Admiralty Rule is usually an equal division in the ordinary case of vessel damage, the rule

of equal apportionment being "founded upon the difficulty of determining, in such cases, the degree of negligence in the one and the other," as was said by Mr. Justice Blatchford in the *Max Morris*, 137 U. S., 1. But, as is evidenced by the case of the *Max Morris* both in the District Court and at circuit, and by the decisions of Judge Pardee in *The Explorer*, 20 Fed., 135, and *The Wanderer*, *id.*, 140, libels in the admiralty for personal injuries by marine tort do not proceed on the theory of an equal division of the damage and never can proceed on such a theory in personal injury cases. In *The Explorer*, *supra*, the libellant was allowed \$280.00 for the loss of 40 days' time at \$7.00 a day and \$40.00 paid by him for the admission to a hospital and his costs, but nothing more; while in the other case the libellant recovered his expenses for direct care, attention, medical service and expenses connected with the injury, but nothing more. The Judge of the Circuit Court in the case at bar misconceived and hence did not understand our argument on this point: (Transcript, Opinion, p. 33). He said:

"I cannot accede to the proposition that Congress intended that the damages in cases of contributory negligence should be *equally* divided."

We did not contend in the Court below, nor do we contend here, that in every case the damage

should be equally divided. Our position is that the distribution should be equitable by deducting from what would otherwise be the employee's full compensation an amount proportioned to the negligence attributable to him, without reference to the amount of the defendant's negligence. The principle of the Admiralty rule is not in all cases, equal division, but is *equitable distribution*, and this is the rule which the statute sought to apply to personal injuries cases.

The Act of Congress of June 11, 1906, (34 Statutes at Large, page 232) being the first employers' liability act enacted by Congress, was declared unconstitutional (207 U. S. 463) as to the states, because invading intrastate commerce. This act, by section 2, dealt with contributory negligence as follows:

"SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery *where his contributory negligence was slight and that of the employer was gross in comparison*, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

But when the new statute was passed this attempt to classify negligence by degree into slight and gross neglects was dropped by eliminating from section 3 of the Act of 1908 the italicised clause in section 2 of the Act of 1906. Thus Congress seems to have deliberately eliminated in re-enacting the statute all reference to the negligence of the employer and any requirement of comparison between the two neglects. The intent of Congress seems clearly inferrable that mathematics were to be cut out of this thing.

In *New World vs. King*, 16 Howard 469, this Court observed of the attempt to classify negligence by degree that:

“It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them.”

Any construction adopting the rule of comparative negligence requires the Court to read into the Act after the words “the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee” something like this—“as compared with the negligence of the common carrier.” This Court will not read any words into a statute not placed there by Congress (207 U. S. 463).

The Circuit Court of Appeals for the Sixth Circuit in *Alabama Great Southern Ry. Co. vs. Coggins*, 88 Fed., 455 (1898), composed of Circuit Judges Taft and Lurton and District Judge Severens, considered an enactment of the Georgia Legislature as to contributory negligence (Section 3534) as follows:—

“No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him.”

Circuit Judge Taft, speaking for the court at page 460, said of this statute that it provided “that, when the negligence of both parties is concurrent and contributes to the injury, then the plaintiff shall not, as at common law, be barred entirely, but may recover damages reduced below full compensation for the injury by an amount proportioned to the amount of the default attributable to him.”

This Court in *Seaboard Air Line Ry. vs. Duvall*, 225 U. S. 477, considered an instruction upon contributory negligence under the 3rd Sec-

tion of the Employers' Liability Act, which instruction was as follows:—

“If you answer the second issue ‘Yes,’ then on the question of damages, the Court charges you that, in an action like the one being tried, if the jury shall find from the evidence that the plaintiff an employee of the defendant company, was guilty of contributory negligence, that is that he contributed to his own injury, such negligence would not bar a recovery if the defendant was guilty of negligence also, but the damages which the jury shall, under the evidence assess to the plaintiff, shall be diminished in proportion to the amount of negligence attributable to the plaintiff.”

In affirming the judgment of the court below this instruction was approved by this court and Mr. Justice Lurton said:—

“The jury was in explicit terms told that if they found the plaintiff guilty of contributory negligence it would not bar a recovery, but that the damages assessed must be diminished in proportion to the amount of negligence attributable to the plaintiff. This was in pursuance of the statute.

The instruction thus approved did not direct a comparison of the negligence of the employe with the negligence of the carrier. Instruction No. 6

in the case at bar was erroneous because that instruction did direct a comparison between the two neglects.

The practical effect of the error remains to be pointed out. The verdict was for \$12,500.00. The Judge in the lower Court considered that the annual earnings of Earnest for three years and eight months "average over \$650.00": (Transcript, page 33). The judge thought that because there was some evidence that "an annuity in the highest class companies of \$650. per annum would cost about \$14850", that therefore the verdict was not excessive. The testimony of Rhodes (Transcript, page 118 and following pages) as to the cost of an annuity should be disregarded in view of the fact that at interest rates on conservative investments a 5% return is usual as a minimum at the present time and 5% on the amount of the verdict would yield \$625.00 per annum, approximately the average earnings of Earnest as found by the Court. Moreover, the loss of a leg does not totally destroy the earning power of a man of his age,—23.

But, said the Court (Transcript, page 33):

"Considering the very substantial sum which (accepting as true the testimony for the plaintiff) should have been awarded as

compensation for pain and mental anguish, I am unable to say that the jury failed to deduct *from* contributory negligence."

As the amount actually awarded would at 5% give Earnest for his lifetime the amount of his earnings: and as the jury's award gave him in addition the ownership of the principal fund, it follows that the sum of \$12,500.00 was awarded for pain, suffering and all other elements of damage. Earnest would receive enough money by the verdict to make him whole in matter of income for his life and to give him the principal instead of having his earning capacity die with him.

The Court added (Transcript, page 33) that

"If it was the duty of the engineer to have stopped before running in to switch No. 2 and to have waited for a signal before moving ahead, it is difficult to charge negligence to the fireman who assumed that the engineer would perform this duty."

Upon this theory the Court found that "it is far from certain that any such deduction" for contributory negligence "should have been made."

It is submitted that upon the uncontradicted evidence Earnest was guilty of contributory negligence such as occupied a large part, perhaps all, of the field of causation of his injury. According to his own testimony he was walking in the middle



of the track without looking back at the following engine until struck: he was during a part of the time waving his torch in greeting to a friend on train 82 then passing on another track: and was without necessity between the rails of the track instead of outside the tracks in a place of safety where he could have examined the switch lever with his torch and turned the switch properly. The work he was doing when hit was examining the switch points, in order to set the switch which could only be done by the lever outside the rails. The engineer, who could not see him on account of the steam escaping from the cylinder cocks necessarily open, was not bound to anticipate such a want of ordinary care on the part of the fireman. In holding that a switchman, walking on the ends of the ties and struck by an engine, was guilty of contributory negligence as matter of law, Simpson, J., in *Kotefka vs. Chicago, St. Paul, Minneapolis & Omaha Railway Co.* (Minn. 1911), 131 N. W., 482, said at page 484:—

“Yet he neither walked in the clear space between the tracks, nor glanced east to see if the expected engine was coming. His conduct was wholly lacking in any of the acts obviously required in the exercise of the slightest care for his safety.”

We believe that the evidence of contributory negligence was not merely, as the lower Court thought, strong evidence for a jury, but shows without contradiction contributory negligence as a matter of law.

The decision of the Circuit Court of Tennessee March 10, 1911, in *Cain vs. Southern Railway Company*, 199 Fed. 211, is in point. In that case the Court was considering whether a verdict of \$10,000.00 for causing the death of an employee, had been subjected to diminution by the jury for contributory negligence of the decedent under Section 3 of the Employers' Liability Act of 1908: and Sanford, D. J., said at page 213:

"After careful consideration of the facts in this case in the light of the foregoing principles, without reciting the evidence in detail, I cannot avoid the conclusion that the jury in returning a verdict of \$10,000. have assessed the damages at a sum which, in the light of all the proof fairly represents full compensation to the beneficiaries for the loss of such pecuniary benefits as they could have reasonably expected from the continued life of the deceased—as distinguished from the damages which might have been recovered if his own right of action had survived—and without adequate deduction for the contributory negligence of the deceased himself, which, under the undisputed facts, was of such character as would, at common law,

have entirely barred recovery, under the rule stated in *Elliott vs. Railroad*, 150 U. S. 245, 248, 14 Sup. Ct. 85, 37 L. Ed. 1068, and that under all the circumstances of this case, just compensation to the beneficiaries, under the limited measure of recovery permitted by the Act of 1908, should not exceed the sum of \$7,500; the verdict, in so far as it exceeds this sum, being, in my opinion, against the plain weight of the evidence and excessive."

**2. Plaintiff's Instruction No. 11 was erroneous in intimating to the jury that they might find a verdict for \$20,000.00; though such a verdict would upon the evidence have been grossly excessive.**

*(Assignment of Error VI)*

The instruction complained of was as follows:

"11. That, if they find for the plaintiff they will find for him such an amount of damages not exceeding \$20,000.00 as will fully compensate him for the suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, the loss of time that naturally and proximately resulted from the injury he suffered; and if they find that the injuries sustained by the plaintiff are permanent, that they will also find for him such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience and loss of time that he will suffer in the future,

subject to instruction No. 6 given for the plaintiff.

In determining this, as to the future, they will consider the plaintiff's bodily vigor and age, as shown by the evidence adduced."

To say to the jury, as was done by plaintiff's instruction No. 11, that they might find a verdict "not exceeding \$20,000" was an intimation to them that a verdict of that amount might under the evidence be reasonable and proper. Such a verdict would have been unsupported by the evidence and must have been set aside as excessive. The mention, therefore of \$20,000 as a possible maximum was we think calculated to mislead the jury.

In *Gilbertson vs. The Forty-second Street Railway Co.*, 14 App. Div. 294 (N. Y. 1897) the plaintiff was injured while alighting from a car of the defendant and claimed \$30,000 damages. She obtained a verdict for \$10,000. The charge of the trial court was that "the jury may award her compensation, fair reasonable, and just, to any amount not exceeding \$30,000." This was held error and Van Brunt, P. J., reading for reversal said:—

"This was an intimation to the jury that under the evidence which had been produced upon the trial, they would have had the right to render a verdict for \$30,000, which was

clearly not the fact; and this intimation upon the part of the court in regard to the nature of the evidence may have affected their consideration, and may have been in some degree the cause of the large verdict which was rendered. Such a charge was eminently calculated to mislead the jury, and to cause them to regard the evidence of the injuries sustained as of greater gravity than its actual purport required. The learned court did not charge that the plaintiff claimed \$30,000, and the jury were entitled to award such sum as the evidence justified, not exceeding that amount, but did charge them that they might award \$30,000—clearly intimating that such a verdict might be upheld upon the evidence in the case. It is evident that a verdict for any such sum would have been extremely excessive.”

As in the New York case so in the case at bar there was no word in plaintiff's instruction No. 11 which showed or even would intimate to the jury that the amount of \$20,000 mentioned by the court was merely the amount claimed by the plaintiff. The jury is not familiar with the pleadings and would not know, unless the court properly guarded the instruction, that the sum of \$20,000 was merely the amount claimed by the plaintiff. Nor would mention of this amount as merely the amount claimed in some other way at the trial than in the instruction cure the error.

The Judge in the Circuit Court though conceding that the instruction was "not letter perfect" nevertheless (Opinion, Tr., page 34) thought the jury "was of higher intelligence than is usual," and hence inferred that the jury could not have misunderstood this instruction. This would make error of law in each case dependent on the intelligence of the jury.

**3. The Court erred in refusing defendant's instruction No. 11 on assumed risk.**

*(Assignment of Error VIII)*

Defendant's Instruction No. 11 was as follows:

"11. The court instructs the jury that the plaintiff, D. E. Earnest, in entering into the service of the company as fireman in the pusher service at North Fork, W. Va., assumed all the risks incident to the service, the dangerous character of which he knew or reasonably should have known, as the business was conducted by the defendant company at the time of the injury, and if the jury believes from the evidence that the injury complained of by the plaintiff resulted from the risk the plaintiff assumed, and not from any negligence on the part of the engineer in charge of the engine that struck the plaintiff, they must find for the defendant."

This instruction was based upon the evidence in the case and should have been given.

The doctrine of assumed risk was thus stated by this court by Mr. Justice Day in *Choctaw, Oklahoma & Gulf R. R. Co. vs. McDade*, 191 U. S. 64, (1903):

“The servant assumes the risk of dangers incident to the business of the master, but not of the latter’s negligence. *Hough vs. Texas & P. R. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Wabash R. Co. vs. McDaniels*, 107 U. S. 454, 27 L. Ed. 605, 2 Sup. Ct. Rep. 932; *Northern P. R. Co. vs. Herbert*, 116 U. S. 642, 29 L. Ed. 755, 6 Sup. St. Rep. 590; *Northern P. R. Co. vs. Babcock*, 154 U. S. 190, 38 L. Ed. 958, 14 Sup. Ct. Rep. 978. The question of assumption of risk is quite apart from that of contributory negligence.”

The Act declares how far assumed risk as a defense is abolished, namely: to the extent, but only to the extent, that the carrier has disobeyed some statute enacted for the protection of the employe. To the case at bar the doctrine of assumed risk applies fully except that Earnest, the employe, would not assume the risk of a fellow servant’s negligence, such as that of the engineer. Therefore, the instruction for the defendant No. 11 excepted from the assumption of risk the negligence, if any, on the part of

the engineer and directed the jury to find for the defendant only if the injury was caused by the risks of the service and not caused by any negligence on the part of the engineer.

In *Chicago, Milwaukee & St. Paul Ry. Co. vs. Voelker*, 129 Fed. 522, (C. C. A. Eighth Circuit, 1904), plaintiff was at work in a yard where cars were being "kicked" in distributing the cars of a freight train and was injured while making the coupling. His theory of the case was (1) that the coupler was defective, and (2) that other employees were negligent. The jury brought in a general verdict for the plaintiff and error was assigned upon refusal of the Circuit Court to instruct the jury as follows:—

"If, while Voelker was working in the yards, it was the general and uniform custom to kick cars down to the fieldman without giving him any notice or warning, and Voelker continued in the service, such custom being practiced or acted on, he took the risks arising from this manner of kicking cars, and no recovery can be had because of injury to him caused thereby."

"If, while Voelker was working in the yard, it was the general and uniform custom to kick cars down to a fieldman, so called, without giving him any notice or warning, and Voelker was acting as fieldman, and cars were kicked down to him



without giving him notice or warning, and he remained working in the yard while this custom or practice was observed, there can be no recovery for any injury done him because of the kicking cars to him without giving notice or warning that it was to be done."

Circuit Judge Van Devanter, at page 530, said:—

"It was therefore the right of each party to have the jury correctly instructed respecting each of the claimed acts of negligence the same as if the right of recovery rested upon it alone; and, if there was material error in the instructions given or refused respecting either charge of negligence, the verdict, being general, cannot stand."

And again, alluding specifically to the instructions quoted above, which were refused, he said at page 532:—

"The rejection of both was error. Each is in terms carefully confined to the charge of negligence in kicking or sending down the second set of cars, and each requires that the custom should have been general and uniform, and that Voelker should have continued in the service while the custom was being observed. If it was general and uniform, and was observed during his continuance in

the service, it was manifestly within not merely his means of knowledge, but his actual knowledge. He was an experienced railroad employe, and was familiar with this branch of that service, having been in defendant's employ as a brakeman and switchman for a period of eight years. He therefore understood the dangers incident to the observance of such a custom."

This has been the uniform effect of the decisions of the Circuit Courts of Appeals:—

- Bohn Co. *vs.* Erickson, 55 Fed 943, (C. C. A., 8th Circuit, 1893);
- A. T. & S. F. R. Co. *vs.* Myers, 63 Fed. 793, (C. C. A., 7th Circuit, 1894);
- Denver & Rio Grande R. Co. *vs.* Norgate, 141 Fed. 247, (C. C. A., 7th Circuit, 1905);
- Peirce *vs.* Clavin, 82 Fed. 550, (C. C. A., 7th Circuit, 1897);
- Terry *vs.* Schmidt, 116 Fed. 627, (C. C. A., 2nd Circuit, 1902);
- Southern Ry. *vs.* Carr, 153 Fed. 106, (C. C. A., 4th Circuit, 1907);
- Haines *vs.* Spencer, 167 Fed. 266, (C. C. A., 3rd Circuit, 1909).

And of the State Courts:

- Southern Ry. *vs.* Foster, (Va., 1911), 69 S. E., 972.

The refusal of this instruction was prejudicial error, especially when we remember that, as stated in the candid opinion of the learned Judge in the Circuit Court, "the weight of evidence supported the defendant's case."

**4. The court erred in refusing to charge defendant's instruction No. 9 without omitting the conclusion.**

*(Assignment of Error IX)*

The Railway Company, defendant below, requested the following instruction:—

"9. The court instructs the jury that if they shall believe from the evidence that it was the custom and practice in the North Fork yard for the fireman to line up the switches and for the engineer to follow him at a rate of three or four miles per hour without signals, or upon signal to proceed given at switch No. 3, and if they shall further believe from the evidence that plaintiff was familiar with this custom and practice in said yard, and that, at and before the accident which resulted in plaintiff's injury, engineer Drawbond was proceeding in accordance with this custom, then they are told that the said engineer Drawbond had the right to act on the assumption and belief that the plaintiff, in lining up the switches, would take reasonable precaution for his own safety against the approaching engine, and it

was not the duty of engineer Drawbond to keep a lookout for him."

But the Court, although recognizing the propriety of the instruction, nevertheless struck out an essential part "and it was not the duty of Engineer Drawbond to keep a lookout for him." Unless the conclusion of the instruction was stated the jury could not form an intelligent judgment as to the verdict which the facts would require if found as stated in the instruction. Striking out the conclusion was akin to a legislature striking out the enacting clause of a bill.

The view of the evidence presented by the Court to the jury in the part of this instruction which was given, compels the conclusion which was omitted. This Court, in *Aerkfetz vs. Humphreys*, 145 U. S., 418 (1892) in which plaintiff, an employee, was run down by a switch engine with no lookout pushing two cars, the plaintiff having been standing at work with his back toward the approaching cars, laid down the rules of duty in yards, and Mr. Justice Brewer said:

"Upon these facts we observe that the plaintiff was an employee, and, therefore, the measure of duty to him was not such as to a passenger or a stranger. As an employee of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were

moved at slow rate of speed, not greater than that which was customary, and that which was necessary in the making up of trains.

\* \* \* There could have been no thought or expectation on the part of the engineer, or of any other employee, that he thus at work in a place of danger would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employee, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. \* \* \* The person in direct charge had a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach."

and again in conclusion:

"It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendants, and if by any means negligence

could be imputed to them, surely the plaintiff by his negligent inattention contributed directly to the injury."

No higher duty was owing to Earnest in the present case. The instruction was proper to present a theory of the case supported by evidence to the jury.

Respectfully Submitted,

ROY B. SMITH,  
JOHN H. HOLT,  
THEODORE W. REATH,

*Counsel for Norfolk and Western Railway  
Company, Plaintiff in Error.*

DECEMBER, 1912.

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IN THE  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

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**No. 153.**

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NORFOLK & WESTERN RAILWAY COMPANY,  
PLAINTIFF IN ERROR,

*vs.*

D. E. EARNEST, DEFENDANT IN ERROR.

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**BRIEF FOR D. E. EARNEST, DEFENDANT IN ERROR.**

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**Statement.**

This was an action under the Federal Employers' Liability Act of April 22, 1908, to recover for injuries inflicted upon an employee by the alleged negligence of a fellow-employee.

A demurrer to the original declaration was sustained (Transcript of Record, p. 11) and the trial was had upon the amended declaration (p. 12). The only ground of recovery set out in the amended declaration was the alleged negligence of the engineman in charge of one of defendant's engines.

The declaration alleges the interstate character of the defendant's business as a common carrier and the plaintiff's employment by the defendant in that business as a fireman, whose duty it was at the time of the injury to pilot an engine out of the yard in order to couple the same to an interstate train, to be pushed over a grade; that his duty required him to walk ahead of the engine for the purpose of lining up the switches, and after each switch had been examined, and adjusted if necessary, to signal the engineer to come ahead; that it was the duty of the engineer to keep a look-out for him and for his signals, and not to run upon or over any switch until signaled to do so. The particular acts of negligence charged in the declaration are that the engineer operated his engine in a careless manner and did not keep it under proper control and did not give plaintiff sufficient time to examine, and adjust if necessary, switch number 2, but that the engineer, without waiting for a signal from the plaintiff, ran the engine over this switch, and in doing so struck and injured the plaintiff, who was at the time engaged in examining the switch.

The general sufficiency of the declaration was not challenged in the trial court. The only grounds of demurrer (p. 16) and assignment of error No. 1 (p. 280) were that the Federal Employers' Liability Act of April 22, 1908, was unconstitutional and void. This was the principle defense as disclosed by the record, and because thereof writ of error was sued out to this court.

#### **The Facts Relating to Duties of Plaintiff and of the Engineer Who Inflicted the Injury.**

The plaintiff, aged 23, had been employed for three years and eight months (Transcript, p. 35) by defendant at the time of his injuries. He reported for duty as fireman at North Fork, West Virginia, about 11 p. m. February 13, 1909, at his engine, and after getting the engine ready and after the engineer, who was late, as testified to by the plain-

tiff, arrived the engine started, and the plaintiff jumped down from the engine to go ahead and set the switches and pilot the engine from the yard (p. 36). The switch levers, 18 inches to 2 feet long and 2 inches by one inch in width and thickness (pp. 39, 82), laid to the left alongside of the track (p. 38); the plaintiff says (p. 36):

"He" (Drawbond, the engineer) "started, and I jumped down off the engine and ran to the left side and went to switch No. 3, and throwed the switch and crossed over, and waved him ahead. Then I went on up the track to examine the other switches. Before I got switch No. 2 examined, I was caught by the engine."

Plaintiff testified (p. 43) that when he waved the engineer ahead at switch No. 3 the engine was running "very slow;" that it was then about 75 to 100 feet behind him; that he went forward from switch No. 3 to switch No. 2, walking between the rails of the track, because (p. 40)

*"the engineer could see me better by my being in there between the track and it was a better place to walk. The yard or a heap of it had things laying on it so you couldn't get over it, covered with ashes, coal and other stuff. In between the tracks it was clean and I could get along in there better."*

This was corroborated by fireman Gordon, a witness for defendant, who said (p. 216):

*"There was generally obstructions and blocks laying along where we got the engine from, down at the lower end,"*

and (p. 217) was asked the question:

*"What would you need it (torch) at No. 3 for, to see where you were walking, what was in the way of your walking on No. 3?"*

*"A. As I told you, there might be some obstruc-*

tions or something or there might be blocks or something laying along down there.

"Q. Do you mean laying along down between the rails or outside of the rails?"

"A. Between the tracks, between 3 and 4."

Then, after stating that it was always perfectly clean between the rails of the track, he was asked (p. 217):

"Those blocks and obstructions were between the tracks and not between the rails?"

"A. Yes, sir. Down there in between. I have seen it."

It was 130 feet from switch No. 3 to No. 2. Plaintiff said (p. 43): "I was kinder going in a trot;" that he was gaining on the engine instead of the engine gaining on him.

Plaintiff continued to switch No. 2, and was examining the needle points of the switch when he was caught by the engine (pp. 38 and 68). The uncontradicted testimony is that these switches had no targets or lights on them (pp. 39, 82, 86, 95); that the levers were slender pieces of iron about two inches wide and an inch thick; were black and were flat on the ground (p. 39), and that the ground was black from coal dust and cinders. Plaintiff testified (pp. 39 and 40) that it was difficult to tell from the lever which way the switch was set; that he could determine much more readily (p. 82) by looking at the needle points. John Earnest (p. 86) said:

"After night, it is a heap easier to see the needle points because the light shines on the rail, you know, and you can see the needle points easier than you can see the lever laying flat on the ground."

Plaintiff testified that when he reached switch No. 2 he did not stop, but merely "kinder checked up and throwed my torch down" to examine the switch, and at that instant he was caught by the engine (p. 38), and that it was his duty to examine these switches, including switch No. 2, adjust them if necessary, and then to wave the engineer ahead;

that if necessary, in order to be sure that the engineer saw him, he was supposed to cross over to the right side of the track to give this signal. He fell on the right side of the track (pp. 38, 69), where he should be to give signal (pp. 41, 93, 113). Emmett Hall, who had been a fireman of the defendant company three years and eight months and an engineer five years and eight months (p. 110), and who worked in and out of North Fork yards hundreds of times, and who had worked some in the pusher service (p. 114), said (p. 113) that he would throw the switch and cross over to the right side to display the signal. Engineer Drawbond, who ran over Earnest, stated (p. 143) that if his engine had been within 73 feet of Earnest at the time signal was given at switch No. 2 it would have been necessary for Earnest to cross over to the right side to give the signal, and defendant's witness, M. D. Hall, stated (p. 192) that after the accident he saw a man's track crossing from the switch lever to the opposite side. Rule 829 of the company (p. 104) provides:

\* \* \* "When hand signals are necessary they must be given from such point and in such way that there can be no misunderstanding on the part of enginemen or trainmen as to the signals or to the train or engine for which they are given."

The record (pp. 62, 63) discloses that in making application for employment Earnest bound himself to "study the rules governing employees on this road carefully, keep posted, and obey them," and by the record (pp. 54, 55, 56) it is shown that Earnest faithfully kept this obligation on his part and that he had every year been given by the company the highest credit records that could be given any employee; that he had not had a single suspension recorded against him, and that in order to show the appreciation of the company of his good work they had given him a credit of thirty days on his record, being the maximum allowance under the rules.

Earnest also testified that it was the duty of the engineer not to run upon or over the switch until he had been signaled to come forward (pp. 38, 40, 67). John Earnest testified (p. 96) :

"If he (the engineer) don't get a signal from the fireman, or see him so he can wave him ahead, he is expected to stop before he goes through the other switch. He has no right at all to go through the other switch before he gets a signal from the fireman that he is ready."

Emmett Hall, above mentioned, an engineer, who had been in the employment of the Norfolk & Western Railway Company for several years, said with respect to the duties of the fireman and engineer that "he (the fireman) is supposed to go in front of his engine and see that all of the switches are changed, and give the signal to engineer if they are ready to come on out" (p. 111); that "his (the engineer's) duties are not to run over a switch in a yard there where he is fetching an engine out. His duty is to wait until he gets a signal, for he don't know how the switch is maybe, and if he don't know how it is, he must wait for signal" (p. 111); that "You let a man run through a switch with an engine and tear the switch up and see if he don't get a suspension. It is against the company's rule" (p. 114).

J. W. McDaniel, one of the defendant's witnesses, an engineer, in the employment of the railway company, testified that running through switches before they were set might damage the switch or break the lever, and that it was against orders of the company to do so (p. 202), and he generally kept his eye on fireman to see he did not get run over (p. 203). This is confirmed by the plaintiff (p. 260).

Ray M. Gardner, an engineer in the employment of the railway company and a witness for the defendant, also testified, in substance (p. 234), that the rules of the com-

pany required an engineer to keep a lookout all the time when going ahead in order to guard against danger and obstructions on the track, and that he considered a fireman as an obstruction, and that it was the duty of an engineer to keep a constant lookout for obstructions and signals, and that it was his duty so to do on the North Fork yard, and that the railway company's rule, which reads in part "554 \* \* \* to keep a constant lookout for signals and obstructions" applies to the North Fork yard where the injury occurred, as well as all over the system. This rule in full is in the record (p. 41) and relates to the duties of engineers.

And engineers are not prevented from keeping a lookout by open cylinder cocks and escaping steam (264, 153).

The accident occurred at switch No. 2.

The engine that inflicted the injury had to pass over switches 3, 2, and 1, in getting on to the main line. One theory of the defense appeared to be that there was no duty resting upon the fireman to give signals at these switches nor of the engineer to look for or wait for signals before passing over these switches. Plaintiff's evidence clearly established those duties. Said J. W. McDaniel, an engineer of defendant company, was one witness by whom it was attempted to show no such duties devolved upon the fireman and engineer, but he testified that switch 2 was just as likely to be against the engineer as switch 3 (pp. 202 and 203), meaning it was not properly set for the engineer to pass over it with his engine, and said Ray M. Gardner, another witness for the defendant and an engineer, testified that signals should be given at No. 3 and at the main-line switch (p. 230), and that signal should be given at No. 3, so he would know it was lined up (pp. 230, 231). V. F. Gordon, another engineer and witness for defendant, said that if the fireman found anything wrong at switches 3 and 2, stop signals and proceed signals would be given (p. 218), and that signal at No. 3 is required (p. 232), and John Drawbond, the engineer who inflicted the injury, said he

was looking for a signal at No. 3 (p. 158). Plaintiff also testified that signals should be given at No. 2, as well as 3 (pp. 265, 266).

#### **Engineer's Duty to Wait for Signal at Switches.**

From all the plaintiff's evidence, confirmed by much of defendant's, as shown by foregoing statement of facts, we are safe in saying it was established by the clearest of language that *it was the duty of the engineer, at the time of the accident, not to pass over the switch at No. 2 until he had received a signal or indication from the plaintiff that the switch was right.* A violation of this duty was the complaint in the declaration. The case was tried upon that theory. The trial court, in overruling a motion to set aside the verdict, after quoting a part of plaintiff's evidence, said (p. 30):

"If the foregoing testimony be true, it was the duty of the engineer not to run into switch No. 2 until he had received a signal from the plaintiff to come on. It is an undisputed fact that the engineer had not received such signal from the plaintiff and had not seen him since he left the engine before it was run over switch No. 3."

Counsel for plaintiff in error, in making objection to evidence in the trial court, said (p. 45):

"That the only negligence charged in this case is failure of engineer to keep a lookout and failure to wait for signal."



## **ARGUMENT.**

The amended declaration (p. 12), upon which the case was tried, states a good cause of action and has not been challenged except as shown by assignment of error I, upon the ground that the act of Congress known as the Employers' Liability Act of April 22, 1908, is unconstitutional. This was the principal defense in the court below and was the ground upon which writ of error was sued out to this court. Since the writ was sued out in this case this court has upheld the power of Congress to pass said act.

Second Employers' Liability Cases, 223 U. S., 1.

### **Assignments of Error Abandoned.**

It appears from brief of counsel for plaintiff in error that they do not rely upon assignments numbered 1, 2, 3, 5, 7, 10 and 11, but that they do rely upon assignments numbered 4, 6, 8 and 9, and our argument will, therefore, be confined to assignments relied upon.

### **Assignment of Error No. IV.**

By assignment No. IV (p. 282) it is claimed that plaintiff's instruction No. 6 is erroneous—

“in not charging the jury that they must diminish the damages for contributory negligence and also in charging a different method of diminution from that laid down in section 3 of the act of Congress of April 22nd, 1908, and because it is based on the act of Congress of April 22nd, 1908,” &c.

This instruction (p. 270) reads as follows:

*“Plaintiff's Instruction No. 6.*

“Contributory negligence is the negligent act of a plaintiff which concurring and co-operating with the

negligent act of a defendant is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence as compared with the negligence of the defendant.

"If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence."

The court had just told the jury by plaintiff's instruction 5 (p. 267) that—

"Negligence is the omission to do that which a reasonably careful and prudent person would ordinarily do under the circumstances of any given situation, or doing that which such a person would not do. It is measured by the exigencies of the occasion."

*Plaintiff's Instruction No. 6 contained several propositions of law to which only a general exception was reserved and was properly given.*

This instruction No 6 complained of contained three propositions of law, all of which are believed to be sound. It (1) defined, *when considered with instruction No. 5*, contributory negligence; (2) told the jury that if they found contributory negligence the plaintiff was not to be defeated entirely, but that the act of Congress under which the suit was brought provide—

"the damages shall be diminished by the jury in proportion to the amount of negligence attributable"

to the plaintiff, and (3) that if the defendant relied upon contributory negligence, the burden was upon it to establish that defense by a preponderance of the evidence.

The case of *Baltimore & Potomac Railroad vs. Jones*, 95 U. S., 439, 441, 442, is authority for these instructions 5 and 6, both as to negligence and contributory negligence.

By the second proposition in the instruction complained of the jury were told that if they should find—

“plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought, provides that such contributory negligence is not to defeat a recovery altogether, but the damages *shall* be diminished by the jury in proportion to the amount of negligence attributable to such employee. So if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence as compared with the negligence of the defendant.”

The instruction substantially embodies the principle of comparative negligence set forth in section 3 of the Employers' Liability Act. That section says that when contributory negligence is shown—

“the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee.”

Counsel for plaintiff in error contend at some length in their brief that section 3 of the act does not adopt the rule of comparative negligence.

But this court, in stating the meaning and effect of this provision, said:

\* \* \* “the rule exonerating an employer from liability for injury sustained by an employee through the concurring negligence of the employer and the employee \* \* \* is displaced by the rule of *comparative negligence*, whereby the exoneration is only

from a proportional part of the damages corresponding to the amount of negligence attributable to the employee." (Italics ours.)

Second Employers' Liability Cases, 223 U. S., 1, 50.

The third proposition in instruction No. 6 told the jury that if the defense of contributory negligence was relied upon the burden was upon the defendant to establish it.

Washington & Georgetown Railroad Company *vs.* Gladmon, 15 Wall., 401, 406, says:

"The want of such care or contributory negligence, as it is termed; is a defense to be proved by the other side. The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances that convict him of concurring negligence, the defendant must prove them, and thus defeat the action. Irrespective of statute law on the subject, the burden of proof on that point does not rest upon the plaintiff."

To the same effect are:

Indianapolis, &c., R. Co. *vs.* Horst, 93 U. S., 291, 298.

Union Pac. R. Co. *vs.* O'Brien, 163 U. S., 451, 456.

It is submitted that plaintiff's instruction No. 6 is free from error in all three propositions set out therein, but whether they are all sound or not some one or more of them undoubtedly are, and no such specific objection was made and saved in the trial court as will enable an appellate court to say error was committed.

By reference to bill of exception No. 3 (pp. 269, 270) and objection noted in the proceedings at the trial (p. 23), it will be seen a general exception only was made and saved to this instruction, although it contained several propositions of law. No particulars of alleged errors were called to the attention of the trial court and saved in the exceptions, nor was any effort made by the defendant in the trial court to correct the alleged errors here complained of by requesting an

instruction embodying correct propositions of law, according to the view of defendant below. The trial court in overruling the motion to set aside the verdict said (p. 33), speaking of this instruction and objections then urged (not upon trial but after verdict and on motion to set aside):

"Plaintiff's instruction No. 6 was, within my distinct recollection, not objected to on either of the grounds of objection now asserted."

The trial court further said (p. 34):

"Nor can I see much force in the other contention. In the instruction it is said: 'the damages shall be diminished by the jury in proportion to the amount of negligence attributable to said employee.' While the concluding sentence of the instruction would probably not have been phrased just as it was, had attention been called to the point; yet, I do not believe that it misled the jury, or that it could possibly have done so. And it seems therefore unfair to set aside a verdict for a verbal inaccuracy so slight that it escaped the attention of both court and counsel for defendant, and which in all human probability had absolutely no effect on the jury."

What specified objections, if any at all, were made to this instruction before verdict are not disclosed by this record. The court's opinion in overruling motion to set aside verdict states two objections were then urged, but neither of them was made before verdict (p. 33). The court says, referring to this instruction 6, "I cannot accede to the proposition that Congress intended that damages in cases of contributory negligence should be equally divided," from which it would appear one objection on motion to set aside verdict was the instruction did not provide for an equal division of damages, following the admiralty rule laid down in *Atlee vs. Packet Co.*, 21 Wall., 39, 395, wherein Mr. Justice Miller said:

"By the rule of the admiralty court, where there has been such contributory negligence, or, in other

words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties."

The other objection, upon motion to set aside verdict, was, according to trial court, "a verbal inaccuracy so slight that it escaped the attention of both court and counsel for defendant" (p. 34) upon the trial. A trial court may set aside a verdict if convinced its instructions were wrong, although objection was not made at the trial, but an appellate court will not notice objections that were not made before verdict.

Pittsburgh, C. & St. L. Railway Company *vs.* Heck, 102 U. S., 120, in an opinion by Mr. Chief Justice Waite, states the rule as follows:

"A trial court may, in the exercise of its judicial discretion, grant a new trial, if convinced that its charge was wrong, even though its attention was not called to the error complained of before the case was finally submitted to the jury. But not so with us. Our power is confined to exceptions actually taken at the trial. The theory of a bill of exceptions is that it states what occurred while the trial was going on. Time is usually given to put what was done into an appropriate form for the record, but, unless objection was made and exception taken before the verdict, no case is presented for a review here of the rulings at the trial."

Hanna *vs.* Maas, 122 U. S., 24, 26, says of this practice:

"The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains."

Instruction No. 6 covered several propositions of law, and it seems to be well settled that an exception of a general character to an instruction covering a number of elements of damages will not cover specific objections which in fairness to the court should be called to its attention in order that it may, if necessary, correct or modify its instructions.

*McDermott vs. Severe*, 202 U. S., 600, 610.

### **Jury Not Misled—Damages Proven Support the Verdict.**

The jury was not misled by this instruction. The trial court, in reviewing the evidence as to damages, observed (p. 33): "I am unable to say the jury failed to deduct for contributory negligence." The jury had before it evidence of plaintiff's age, high character as an employee (pp. 54, 56), his earning capacity (pp. 57, 235, 236, 241), which is shown to be as much as eighty and ninety dollars per month, some months. His life expectancy was shown to be 40 years (p. 118), and that an annuity would cost him as follows (pp. 118-120):

Annuity.	Cost.
\$900.....	\$18,200 to \$20,500
800.....	16,200 to 18,300
700.....	14,200 to 15,900
600.....	12,095 to 13,700

But it is said in brief of learned counsel for plaintiff in error, at page 35, this evidence should be disregarded. A general objection was made at trial (Transcript, p. 118), but was never made the subject of a bill of exception or an assignment of error, and besides such evidence is admissible in aiding the jury to fix damages.

*Vicksburg, &c., Railroad Co. vs. Putnam*, 118 U. S., 545, 554.

Moreover it was shown there is no other known way of obtaining an annuity except to purchase it at the cost above mentioned (p. 121). The record also shows that plaintiff's earning power has been practically destroyed (pp. 51, 52); that before the injury he enjoyed the best of health (p. 60) and had the highest standing and character as a faithful, efficient, and trusted employee (pp. 54-56). It is also shown that his pain and suffering were very great; his left heel was mashed, and his right leg crushed from the knee down, being held together by the clothes and flesh, and was amputated between knee and the body; that after operation he suffered a great deal and has continued to suffer ever since, and that it is with pain and difficulty he is able to walk at all and that on smooth ground, and that he had repeatedly tried to get employment, but without success (pp. 46 to 52); that he is practically being taken care of by his father (p. 53), and that among other efforts to secure employment he had applied to his old employer, the railway company, but to no avail (pp. 52, 77, 80), and that he could not with a limb gone secure employment in the work for which he was prepared (p. 52).

It is therefore perfectly apparent from this record that the verdict was not excessive, even assuming a deduction should have been made for contributory negligence.

The learned judge who saw and heard the witnesses, in overruling motion for a new trial, said (p. 33):

"The actual earnings of plaintiff during his service for the defendant—accrued in part during a period of marked financial depression—averaged over \$650 per annum. He has been permanently disabled to some extent at least. There is much evidence to the effect that he cannot again earn a living as a fireman or as a farm hand. An annuity in the highest class companies of \$650 per annum would cost about \$14,850. (*R. Co. vs. Putnum*, 118 U. S., 545, 554.) Considering the very substantial sum which (accepting as true the testimony for the plaintiff) should have been awarded as compensation for pain and



mental anguish. I am unable to say that the jury failed to deduct for contributory negligence. And further, on the assumption stated, it is far from certain that any such deduction should have been made. If it was the duty of the engineer to have stopped before running into switch No. 2, and to have waited for a signal before moving ahead, it is difficult to charge negligence to the fireman who assumed that the engineer would perform this duty."

### **Earnest's Alleged Negligence Answered.**

Brief for plaintiff in error takes the view "that upon the uncontradicted evidence Earnest was guilty of contributory negligence, such as occupied a large part, perhaps all, of the field of causation of his injury" (Brief of Plaintiff in Error, p. 36). We do not think the record supports this view. Earnest walked in the middle of the track from switch 3 to 2 (p. 38), but he was not injured while walking from one switch to the other, and even if such conduct were negligent (that is, walking from switch 3 to 2 in the middle of the track), yet if it did not cause the injury, then walking in that manner from one switch to the other is not contributory negligence.

The evidence is that Earnest was hurt at switch No. 2 (pp. 42, 128), and as shown in the statement of facts of this case, numerous witnesses testified it was the duty of Earnest to cross over to the right side to give the signal to engineer, and a man's track was found at switch No. 2 (p. 192), indicating Earnest was crossing from left to right side where rule 829 of the company would apparently require him to be in giving signal to engineer (p. 104). Besides, as shown in the statement of facts, it was a better place to walk, on account of obstructions between the tracks, and also because he could better and more quickly perform his work in that manner. The record also shows that in performing their duties the witnesses repeatedly testified to being on, over, or crossing the track (p. 36): "Why, I run up switch No. 3 and threw the switch and crossed over the

switch and waved him ahead" (p. 37); "Threw switch and crossed over" (p. 65); "Crossed over" (pp. 37, 65); "Crossed over so he could see me well" (p. 66); "Crossed over so he could see me good" (p. 83). Emmett Hall, an engineer, said "They generally all went in the middle of the track" (p. 112); "between the rails" (p. 112); "It was a regular habit, so he could see me good and not delay" (p. 83); "Was the practice to cross over on the yard" (pp. 93, 94, 113); "If necessary, should cross over" (p. 225).

The foregoing references to the record of witnesses, both for the plaintiff and the defendant, show that firemen in discharging duties imposed upon plaintiff were apparently constantly on, over, or along the track, and would refute the assumption that Earnest was guilty of negligence.

The case of *Kotefka vs. Chicago, etc., R. Co.* (131 N. W., 482, 484), cited by plaintiff in error, is so unlike the case at bar that it is doubtful if it can be regarded as an authority. Kotefka, at the time of the injury, was walking upon the main track which he knew was "used continuously \* \* \* and was liable to be used at every and any moment," and that it was a live track and dangerous to be on or near it at any time. He was not run over by his own engine on the track where his duties required him to be, but on another track and by another engine, and there was no apparent reason or necessity for his being upon the other track at all.

In case of *Payne vs. Eastern Ry. Co.* (91 Wis., 346; 64 N. W. Rep., 1005, 1007), where a switchman was run over and killed by a moving car which he was attempting to switch, a non-suit was granted on defendant's motion, and the Court of Appeals reversed this action, saying:

"Negligence cannot be assumed by the court solely from the fact that he was in front of the car, because his duties were there, or at least may have been there. It is not the case of a passenger or foot traveler who goes in front of a moving train."

Whether a switchman has kept a proper lookout is usually a question for the jury (*Lake Shore R. R. Co. vs. O'Connor*,

115 Ills., 255, 262), in which case the law is stated to be (syllabus) :

"Whether a switchman engaged in the service of a railway company and who is killed by an engine on a track while in the discharge of his duties was guilty of negligence in failing to keep a constant lookout for the approach of engines and trains is a question of fact for the jury and not of law."

### **Earnest's Statement After the Accident.**

Some emphasis is placed upon the conversation Earnest had with his engineer, Drawbond, immediately after the injury (Brief for Plaintiff in Error, pp. 11 and 12), and is said to be an admission of contributory negligence. Earnest's evidence upon this point shows this alleged admission is without significance. On direct examination (pp. 47, 48) he testified:

"A. Why, yes, I was talking to him (Drawbond), and I remember asking him to go to Bluefield with me. I remember telling him not to worry about it, that possibly I was in fault. He was worrying a good deal and I didn't want him to worry about it.

"Q. So, then you remember asking him to go with you to Bluefield?

"A. Yes, sir.

"Q. And you asked him not to worry about it, that possibly you were in fault?

"A. Yes, sir.

"Q. Did you know who was in fault?

"A. Yes, sir; I knew that he was coming——

"The defendant company, by its counsel, objects to plaintiff stating what he knew or inferred or surmised, and asks that he be required to state what actually happened there, so that those events may speak for themselves.

"The COURT: The court thinks that counsel for plaintiff should have the right to a full explanation from the witness why he made the statement witness says he made to Mr. Drawbond. He is entitled to explain whether he meant literally what his language

would be construed to imply, or whether, as he says, he said what he did to relieve the feeling of distress on the part of Drawbond.

"Defendant excepts.

"Q. Well, then, you thought you were going to die and would not see your brother?

"A. Yes, sir.

"Q. What did you say your object was in telling Drawbond it might be your fault?

"Defendant objects.

"Objection overruled.

"Defendant excepts.

"A. I didn't want him to worry about it. He was worrying a good deal about it, and I didn't want him to worry about it, and I told him possibly it was my fault. I don't remember what all I did say to him about it."

### **Negligence of Engineer Drawbond as Shown by Cases.**

In Illinois, etc., *R. Co. vs. Stewart* (Ky.), 63 S. W., 596, a case much like the one at bar, the engineer was held to be negligent. In that case the Court of Appeals of Kentucky, speaking through Judge Hobson, stated that the facts, according to the testimony of plaintiff, were as follows (p. 597):

"Stewart and another switchman named Hamilton, were assisting in switching some cars in the yard. For this purpose, they brought the engine down to a switch intending to run it on a side track. Stewart went to the switch lever to throw the switch. Before he got the switch thrown, the engineer without waiting for a signal from him, came ahead with the engine, which struck the switch rail and threw it back to its original position. This knocked the lever out of Stewart's hand. There was a ball on the end of the lever weighing 12 or 15 pounds, and this ball in the fall of the lever struck the big toe of his left foot and mashed it."

\* \* \* \* \*

"It was the duty of the engineer at the switch to wait for a signal to come forward, and if without waiting for such signal, he ran upon the switch before it was thrown, and thereby injured Stewart who was in the act of throwing the switch, and according to his evidence, was the proper person to give the signal, the company would be liable."

*Richards vs. Louisville, etc., R. Co. (Ky.)*, 49 S. W., 419, 421, is a case also much like the one at bar. In that case the court said:

"It is true that the engineer presumed that appellant would throw the switch, and had no special reasons to suppose that he would fall on the track. Still, it was a dangerous thing to run upon the switch before the signal was given for him to come ahead, and as it resulted in the injury of appellant and was a clear breach of the engineer's duty, under all the facts, especially as the car just in front was to be coupled to the engine by appellant, it seems to us there was sufficient evidence of negligence to go to the jury, and the court erred in giving the peremptory instructions to find for the defendant."

*Cain vs. Southern Railway Co.*, 199 Fed., 211, is cited by plaintiff in error at page 38 of brief on diminution of damages. The facts upon which Judge Sanford based his opinion do not appear in the report of the case, but that case is not an authority upon any question here. The court simply held that in view of the fact the right of action for injury to an employee prior to the amendment of April 5, 1910, did not survive the death of the employee, that in an action for his death the personal representative could not recover for pain and suffering and some other elements of damage, but could only recover for pecuniary loss. The court simply held upon the facts (not stated) that the pecuniary loss disclosed by the evidence was not sufficient to support the verdict rendered. Judge Sanford was sitting as a trial court passing upon a motion for a new trial.

We have undertaken to show in another place that the verdict in this case is fully justified by the evidence, but, as we understand, the amount of this verdict or the question as to whether it should have been set aside as excessive or as not supported by the evidence, are not questions under review by this court.

### **Assignment of Error VI.**

*Plaintiff's Instruction No. 11 Contained Several Propositions of Law. General Objection Only Made. The Words Not Exceeding \$20,000 Explained. The Jury Not Misled.*

By assignment No. VI (p. 283) objection is made to plaintiff's instruction No. 11 on the ground that it—

“intimates to the jury that they might find a verdict for \$20,000.00 though such a verdict would, upon the evidence, have been grossly excessive.”

This instruction (p. 272) reads as follows:

“That if they find for the plaintiff, they will find for him such an amount of damages not exceeding \$20,000.00 as will fully compensate him for the suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, the loss of time that naturally and proximately resulted from the injury he suffered; and if they find that the injuries sustained by the plaintiff are permanent, that they will also find for him such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience and the loss of time that he will suffer in the future, subject to instruction No. 6, given for the plaintiff. In determining this as to the future they will consider the plaintiff's bodily vigor and age, as shown by the evidence adduced.”

In *McDermott vs. Severe* (202 U. S., 600, 610) this court approved an instruction in the following words:

“The jury are instructed that if they find a verdict for the plaintiff they should render a verdict in his

favor for such a sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury, and for the loss of his leg; for the inconvenience to which he has been put, and which he will be likely to be put during the remainder of his life, in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his leg, and for such pecuniary loss as the direct result of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs."

By reference to bill of exception No. 6 (p. 272) it will be seen that only a general objection was saved to the giving of plaintiff's instruction No. 11. It was said by this court in *McDermott vs. Severe*, *supra* (p. 610), speaking of the instruction above quoted, identical with plaintiff's instruction No. 11 in principle and differing but little in wording:

"The court's attention was not called to any particular in which this charge which covers a number of elements of damages was alleged to be wrong, only a general exception was taken to the charge as given in this respect. It has been too frequently held to require the extended citation of cases that an exception of this general character will not cover specific objections, which in fairness to the court ought to have been called to its attention, in order that if necessary, it could correct or modify them. A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases, it is the duty of the objecting party to point out specifically the part of the instructions regarded as erroneous."

In *Baltimore and Potomac Railroad vs. Mackey* (157 U. S., 72, 86) this court said:

"It may be observed that the objection to the instruction containing the particular words complained

of was general in its nature. The instruction embodied some propositions of law to which no objection could be properly made and it was the duty of the defendant to point out, specifically the part of the instruction which it regarded as announcing an erroneous principle of law."

In Tweed's case (16 Wall., 504, 516) :

"Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the court to the jury, where it appears that the complaining party made no effort at the trial to have the point explained."

In the opinion of the trial judge, in overruling motion for a new trial, he calls attention to the fact that if the point made on motion to set verdict aside had been called to the attention of the court at the trial a change in the wording of the instruction could have been made, but also points out that the meaning of the words "not exceeding \$20,000" was explained to the jury. The court's opinion says (p. 34) :

"Plaintiff's instruction No. 11, is not letter perfect. If the point had in any way been called to the attention of the court, the words 'the amount claimed in the declaration' would have been added. But the defect could not have misled the jury. In the opening statement for plaintiff, during the evidence (p. 59), and again in the closing argument, the jury was clearly informed that the sum of \$20,000.00 mentioned in the instruction, was the amount claimed by plaintiff in his declaration. The jury that tried this case was of higher intelligence than is usual. To assume that they understood the instruction in question to be an intimation by the court of the character of verdict desired by the court, is to impute to the jury an entirely unwarranted want of intelligence."

If the defendant upon the trial was concerned lest the jury might be misled by the words "not exceeding \$20,000," it should have requested an explanation of it.



In *U. S. Smelting Co. vs. Parry* (166 Fed., 407), where the defendants excepted to the words "and his mental suffering due to the injury" appearing in an instruction, but did not ask that they be explained in any way, Circuit Judge Van Devanter, at page 416, said:

"Besides, if the defendant was concerned lest the jury might interpret the instruction in the manner now suggested, it should have requested some explanation of it, instead of taking an exception, the fair import of which was that it was objecting to any mention of mental suffering."

Citing—

*McDermott vs. Severe*, 202 U. S., 600, 611.

*So. Pac. Co. vs. Maloney*, 136 Fed., 171.

*Chicago Great Western Ry. Co. vs. McDough*, 161 Fed., 657, 660.

See also—

*B. & P. Rwy. Co. vs. Mackey*, 157 U. S., 72, 86.

*Dotson vs. Miliken*, 209 U. S., 237, 242.

In *Indianapolis R. Co. vs. Horst* (93 U. S., 291, 299) this court said, in passing upon an instruction:

"If there was any ambiguity unfavorable to the defendant, it was the duty of his counsel to bring it to the attention of the court, and ask its correction."

An objection not made before verdict is not subject to review in this court (*Pittsburgh, C. & St. L. Railway Co. vs. Heck*, 102 U. S., 120).

### **Assignment of Error VIII.**

#### *Defendant's Instruction No. 11 on Assumption of Risk Properly Refused.*

By assignment No. 8 (p. 283) error is alleged because the trial court failed to give defendant's instruction No. 11. The assignment says:

"The said instruction is based upon the evidence in the case, and properly states the law applicable thereto."

The instruction (p. 277) reads:

"The court instructs the jury that the plaintiff D. E. Earnest, in entering into the service of the company as fireman in the pusher service at North Fork, West Virginia, assumed all the risks incident to the service the dangerous character of which he knew or reasonably should have known, as the business was conducted by the defendant company at the time of the injury, and if the jury believe from the evidence that the injury complained of by the plaintiff resulted from the risk the plaintiff assumed and not from any negligence on the part of the engineer in charge of the engine that struck the plaintiff, they must find for the defendant."

Counsel for plaintiff in error in their brief do not point out any evidence in the case requiring an instruction upon the doctrine of assumed risks. Nor have they ever, so far as we are aware, called attention to the evidence to which they claim this instruction is applicable, nor does the instruction itself suggest any such evidence. We are left, therefore, to explore the pleadings and the testimony in an effort to ascertain to what particular phase of the case this instruction is supposed to apply.

The amended declaration (p. 12), upon which trial was had, charged that the negligence consisted in the failure of the engineer to keep his engine under control and to wait and observe a signal from the plaintiff at switch No. 2. In the court's opinion (p. 30), overruling motion for new trial after quoting from the evidence, it is said:

"If the foregoing testimony be true, it was the duty of the engineer not to run into switch No. 2 until he had received the signal from the plaintiff to come out. It is an undisputed fact that the engineer had not

received such signal from the plaintiff, and had not seen him since he left the engine before it was run over switch No. 3."

Defendant's counsel said (p. 45), in objecting to evidence:

"That the only negligence charged in this case is failure of engineer to keep a lookout and failure to wait for signal."

It will, therefore, be seen that upon the pleadings, opinion of the court, and statement of counsel for defendant, the case was tried upon the theory that the engineer was negligent in failing to keep a proper lookout and failing to wait for a signal from plaintiff before running upon switch No. 2. There was no question of improper or defective road-bed, appliances, or machinery, nor was there any question of occupational dangers, unless the alleged negligence of the engineer should be termed an occupational danger.

In any view of the matter, however, the instruction in question was properly refused, because:

1st. It was so general in character as to suggest no particular phase of the case to the jury, and could have resulted only in confusion.

2d. It declared the law to be that Earnest "assumed *all* risk incident to the service," whereas the settled law, in the absence of statutory enactment, is that the servant assumes the *usual* or *ordinary* risks of the service, such as are apparent to ordinary observation (Texas, etc., R. R. Co. *vs.* Archibald, 170 U. S., 665, 673).

In the case last cited, the court made the following observation (page 674), which might be made with almost equal propriety with reference to the instruction now under consideration:

"Indeed the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty of endeavoring to supply safe appliances, since it subjects an employee to all risks arising from unsafe ones, if the business be carried on by the employer without reasonable care, and the employee knew, or by diligence could have known not of the dangers incident to the business, but of the harm possibly to result from the employer's neglectful methods."

3rd. The instruction as applied to the alleged custom or practice of bringing engines in and out of North Fork yard without waiting for or requiring signals at switches is erroneous, according to the law as laid down in the case of *Chicago, M. & St. P. Ry. Co. vs. Voelker* (129 Fed., 522), which is cited by plaintiff in support thereof. In the *Voelker* case the instruction was in terms carefully confined to the alleged custom or practice in question, while the present instruction makes no reference whatever to any alleged custom or practice. In the *Voelker* case the instruction "requires that the custom should have been general and uniform, and that *Voelker* should have continued in the service while the custom was being observed"; while the instruction now under consideration did not contain either of these requirements. In the *Voelker* case the court "gave no other instruction on the subject," while in the case now under consideration other instructions, viz., defendant's instructions Nos. 4, 5, 9, and 10 (Transcript of Record, pp. 274, 275) were given, covering every possible phase of the alleged custom or practice in question. In other words, according to the *Voelker* case, the instruction as applied to a custom or practice was erroneous because it omits the essential elements of (1st) uniformity, and (2d) that the plaintiff should have entered into or remained in the service of defendant while it was being practiced. Furthermore, other instructions covering the subject were given in this case.

4th. The instruction as applied to an alleged practice or custom is also erroneous because it omits the essential element that such practice or custom is reasonable. If the custom or practice is unreasonable, the employee will not be held to have assumed the risk of it.

While the foregoing seems to us to effectively dispose of this assignment, we desire to point out that the said instruction is further defective in not exempting from the risks assumed those "incident to the negligence of the carrier's officers, agents, or employees, or any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed," etc., as required by Employers' Liability Act of April 22, 1908 (35 Stat., 65).

Section 1 of said act provides that the carrier—

"shall be liable in damages \* \* \* for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

And section 5 provides—

"that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

Assumption of risk is a matter of contract, express or implied.

*Narramore vs. Cleveland, etc., R. R. Co.*, 96 Fed., 298, 301.

*Davis Coal Co. vs. Polland*, 158 Ind., 607, 614, 615.

If an express contract, the purpose or intent of which is to exempt the carrier from any liability created by the act, is

unavailing, a special defense predicated upon an implied contract (assumption of risk) must also fail.

Wright *vs.* Yazoo & M. V. R. Co., 197 Fed., 94, 97.

Watson *vs.* St. L., I. & M., etc., Ry., 169 Fed., 942.

Malloy *vs.* Northern Pacific Ry. Co., 151 Fed., 1019, 1020.

Philadelphia, B. & W. R. Co. *vs.* Tucker, 35 App.

D. C., 123, 146, 147, 148 (affirmed 220 U. S., 608).

O'Malley *vs.* South Boston Gas Light Co., 158 Mass., 135.

Coley *vs.* North Carolina R. Co., 128 N. C., 534-538.

In Wright *vs.* Yazoo & M. V. R. Co., *supra*, p. 97, Judge McCall reasons thus with reference to the Employers' Liability Act on subject of assumption of risk:

"What was the purpose of Congress in passing the Employers' Liability Act? If plain words are to be taken in their ordinary meaning, it was to make common carriers by railroad, while engaged in interstate commerce, liable in damages to any of its employees for injury or death suffered while he is employed by such carrier, in such commerce, resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, etc., and to provide that, although the employee may have been guilty of contributory negligence, that shall not bar a recovery, but shall go in reduction of damages." \* \* \*

"Shall the courts destroy the effect of the act in this particular by holding that common carriers are not liable to their servants for injury or death inflicted as a result of the negligence of their officers, agents, or employees, upon the ground that the servant assumes the risk incident to the negligence of the officers, agents, or employees of the carrier." \* \* \*

"It is insisted that since the act provides that he shall not be held to have assumed such risks in cases only where the violation by the common carrier of any

statute enacted for the safety of employees contributed to the injury, the maxim, '*expressio unius est exclusio alterius*,' applies. I do not think this insistence sound, or that it should be sustained."

\* \* \* \* \*

"As I construe the act, the risk that the employee now assumes is the ordinary dangers incident to his employment, which does not include, since the passage of this act, the assumption of the risk incident to the negligence of the carrier's officers, agents, or employees, or any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

If there was any risk assumed by the plaintiff in his contract of employment on account of the manner in which the business was conducted by the defendant at North Fork, it will be seen from the above and by discussion of error No. 9, *post*, and authorities there cited, that the jury were fully and fairly charged as to all the rights of the defendant in that behalf.

### Assignment of Error IX.

*The Court Properly Modified Defendant's Instruction No. 9 and Fully Instructed upon the Case.*

By assignment No. 9 (p. 284) it is alleged as error that the court struck from defendant's instruction No. 9 the words "and it was not the duty of engineer Drawbond to keep a lookout for him." The assignment of error says: "Under the facts stated in the instruction and which were based upon the evidence in the case, it would not be the duty of the engineer to keep a lookout for the fireman proceeding ahead of the engine, and the instruction should have been given as asked for."

By reference to the defendant's instructions as set out in bill of exceptions No. 8 (pp. 273-276), it will be seen that

the court gave for the defendant full and favorable instructions covering every feature of the case. Among those are instructions numbered 4, 5, 6, 10, 12, 14, and 15, to which attention is invited.

By defendant's instruction No. 10 the jury were told, among other things—

“that it was not the duty of the defendant company, through its engineer, John Drawbond, to keep a constant lookout for plaintiff while he was engaged in lining up switches, but only to exercise ordinary care in keeping a lookout to prevent any danger which might be reasonably apprehended to him under the circumstances and conditions.” \* \* \*

By defendant's No. 4 they were told—

“that if they believe from the evidence that the custom and practice in the Northfork yard was for the engineer to follow the fireman with his engine as he lined up the switches, and not to wait for a signal to proceed after the first switch, then it was not the duty of the engineer to wait for such signal, and he had the right to proceed without any being given, and the fact that engineer Drawbond did approach switch No. 2, where the plaintiff was injured, without any further signal from him is no evidence of negligence against defendant company.”

By defendant's No. 5 they were instructed:

“If the jury shall believe from the evidence that it had been the custom and practice in the North Fork yard for the fireman to go ahead and line up the switches for the engineer and for the engineer to follow the fireman with the engine at the rate of three or four miles per hour, after receiving a signal to do so at switch number 3, and then to proceed without further signals being given; and if they shall further believe from the evidence that at and before the time of the accident, which resulted in plaintiff's injury, engineer Drawbond was proceeding in accordance with this custom and practice in said yard, then they are told that it was the duty of the plaintiff to look out for his own protection, and if the jury



shall believe from the evidence that he failed to keep such lookout, or to use reasonable care for his own protection, and that his failure to do so was the proximate cause of the accident and his injury, then they will find for the defendant."

And by No. 9 for defendant as given they were told—

"that if they shall believe from the evidence that it was the custom and practice in the North Fork yard for the fireman to line up the switches and for the engineer to follow him at a rate of three or four miles per hour without signals, or upon signal to proceed given at switch number three, and if they shall further believe from the evidence that plaintiff was familiar with this custom and practice in said yard, and that at and before the accident, which resulted in plaintiff's injury, engineer Drawbond was proceeding in accordance with this custom, then they are told that said engineer Drawbond had the right to act on the assumption and belief that the plaintiff in lining up the switches would take reasonable precaution for his own safety against the approaching engine."

The court heard and considered the evidence and decided, with reference to this case, that when it told the jury as it did in instruction No. 10 (p. 275) that it was not the duty of the engineer

"to keep a constant lookout for the plaintiff,"

but only to use reasonable care to observe him, that it should not go further, and tell them, as was requested by concluding words of No. 9,

"it was not the duty of engineer Drawbond to keep a lookout for him."

In refusing to instruct as requested the court was acting with reference to the facts in this particular case, but it is doubted if any case would justify such an instruction. Counsel for defendant properly recognized this principle in their

No. 10, and under the facts the court could not go further by telling the jury that the engineer need not keep any lookout at all.

Plaintiff's witness, one Emmett Hall, an engineer of the company, testified that it was the duty of the plaintiff to line up the switches as was done in this case; that it was the duty of the engineer to wait for signal before running over the switch, which he could only do by keeping some kind of lookout (see opinion of court, pp. 28, 29, and 30), and a rule of the company was introduced (p. 41), which in so far as material reads:

554. Enginemen: They must \* \* \* keep a constant lookout for signals and obstructions," \* \* \*

which rule applied to the situation at the time of the injury, as shown in plaintiff's evidence.

Ray M. Gardner, one of defendant's witnesses, an engineer (p. 234), speaking of rule 554, said it applied at North Fork yard and all over the system.

Courts will be slow, under any circumstances, to say as matter of law that no kind of duty rests upon a locomotive engineer driving an engine through a railroad yard to keep at least some kind of lookout to avoid injury to fellow workmen. Custom or practice would not justify a court in exonerating an engineer from the duty of keeping a reasonable lookout, if no more, to save human life and limbs.

The Employers' Liability Act is undoubtedly remedial and humanitarian, and should be so administered as to give relief to the injured employee and impel carriers and their servants

"to avoid or prevent the negligent acts and omissions which are made the basis of the rights of recovery which the statute creates and defines; and \* \* \* whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged." \* \* \*

See second Employers' Liability cases, 223 U. S., 1, 51.

In *Schlemmer vs. Buffalo, &c., Rwy. Co.*, 205 U. S., 1, 10, this court said of the Safety Appliance Act, which is a kindred act to, and largely incorporated into, the Employers' Liability Act:

"The object was to protect the lives and limbs of railroad employees." \* \* \*

The Circuit Court of Appeals, in *Johnson vs. Southern Pacific Co.*, 117 Fed., 462, construed the Safety Appliance Act so strictly as to defeat its object. This court in reversing their decision said:

"We are unable to accept these conclusions notwithstanding the able opinion of the majority as they appear to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction."

*Johnson vs. Southern Pac. Co.*, 196 U. S., 1, 14.

And again at page 17 it is said:

"The primary object of the act was to promote the public welfare by securing the safety of employees and travelers." \* \* \*

Judge Hundley said of the Safety Appliance Act:

"This act of Congress is a remedial statute, and it is the duty of the court to so construe its provisions as to accomplish the intent of Congress—to protect the lives and limbs of men engaged in interstate commerce."

*United States vs. Central of Ga.*, 157 Fed., 893, 894.

In *Chicago, M. & St. P. Ry. Co. vs. Vollker*, 129 Fed., 522, 527, Circuit Judge Van Devanter said:

"Obviously, the purpose of this statute is the protection of the lives and limbs of men, and such

statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy."

Judge McPherson, in *United States vs. Chicago, &c., Ry. Co.*, 149 Fed., 486, 488, said "an undoubted purpose of Congress was humanitarian."

Judge Sanford, in *Gray vs. Louisville & N. R. Co.*, 197 Fed., 874, 876, said "the Safety Appliance Act is a remedial statute to be so construed as to accomplish the intent of Congress,

(*Johnson vs. Southern Pac. Co.*, 196 U. S., 1.)

(*United States vs. Central R. Co.*, 157 Fed., 893.)

and that its provisions should not be taken in a narrow sense.

(*Schlemmer vs. R. R. Co.*, 205 U. S., 1, 10.)

nor its undoubted humanitarian purposes frittered away by judicial construction.

(*United States vs. Railroad Co.*, 149 Fed., 486.)"

In *United States vs. Chicago, &c., R. Co.*, 173 Fed., 684, 685, Judge McPherson also said of the Safety Appliance Act:

"The great purpose of the statute was to remedy conditions. It is remedial and preventive, and, if observed, will reduce to a minimum the crippling and killing of railroad employes in this country."

In *United States vs. Southern R. R. Co.*, 170 Fed., 1014, 1016, Judge Boyd said of the Safety Appliance Act:

"The statute we are considering is remedial in its character, enacted for the better protection of railroad employees and travelers by rail, and it should be construed by the courts, as far as its terms will admit so as to carry out fully the intention of Congress."

This court in *Second Employers' Liability Cases*, 223 U. S., 1, 50, in passing upon the *Employers' Liability Act* and in pointing out the departures from the common law, said:

"The natural tendencies of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates, and defines." \* \* \*

If there was a "custom and practice" in the North Fork yard, in violation of the company's rule 554 and in contradiction of all of plaintiff's evidence and a part of the defendant's, that would permit an engineer to drive an engine through the yard without keeping any kind of lookout for fellow-employees, it could not justify the trial court in giving such a cruel and careless practice the force and effect of law by saying to the jury it was not the duty of engineer Drawbond to keep any kind of a lookout at all for the plaintiff. Had the trial court established such a rule as the law of this case it would have violated the spirit and defeated the very object of the *Employers' Liability Act*.

The instructions as a whole fully and fairly submitted the case, and there was no error in either refusing defendant's No. 11 on assumed risk or in modifying its No. 9.

In *Indianapolis, &c., R. Co. vs. Horst*, 93 U. S., 291, 295, this court said:

"It is the settled law in this court, that, if the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to instruct further. It may use its own language, and present the case in its own way. If the results mentioned are reached, the mode and manner are immaterial. The court has then done all that it is bound to do, and may thus leave the case to the consideration of the jury. Neither party has the right to ask anything more."

In *Ruch vs. Rock Island*, 97 U. S., 693, 695, this court again stated the rule, saying:

\* \* \* "If the instructions covered all the points, and presented them fully and fairly to the jury, the duty resting upon the judges was well discharged, and it was not error to refuse those asked for by the plaintiff. This is the settled rule in the courts of the United States, and it is a wise one. It prevents the jury from being confused by a multiplicity of counsels, and promotes the right administration of justice."

Where the charge to the jury, taken as a whole, fully and fairly submits the law of the case, the judgment will not be reversed because passages extracted therefrom and read apart from their connection need qualification.

*Evanston vs. Gunn*, 99 U. S., 660, 667.

*Belsea vs. Tendall* (C. C. A.), 190 Fed., 440, 445.

*Chicago, &c., Rwy. Co. vs. McDonough* (C. C. A. Opinion by Judge Van Devanter), 161 Fed., 657, 660.

*North Jersey St. Ry. Co. vs. Purdy* (C. C. A.), 142 Fed., 955, 957.

### Conclusion.

In view of the fact that the principal defense in this case was the alleged unconstitutionality of the act of Congress under which this suit was brought and of its being brought to this court on that contention, and of the further fact that there is no reversible error, if indeed any error at all, in the rulings of the court, it is respectfully submitted the case should be affirmed on the authority of *Second Employers' Liability Cases*, 223 U. S., 1.

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SAMUEL B. PACK,  
THOMAS LEE MOORE,

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**NORFOLK & WESTERN RAILWAY COMPANY v.  
EARNEST.**

**ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF VIRGINIA.**

**No. 153. Argued January 29, 30, 1913.—Decided May 26, 1913.**

The truth of evidence tending to show a custom as to where switchmen walk in a railroad yard is for the jury to determine; and if true it is the duty of an engineer, in the exercise of ordinary care to watch for a switchman whom he knows is in the usual locality and in front of his engine.

It is not error to refuse an instruction as to assumption of risk which is couched in such sweeping terms that it could not enlighten the jury as to the particular phase of the case to which it is deemed applicable.

Fairness to the court requires one objecting to a particular part of the charge as misleading to call special attention to the words in order that the court may either modify or explain them.

An instruction that contributory negligence of the employé goes by way of diminution of damages, held not error because the statute says that in such a case the jury must diminish the damages, it appearing that the words objected to followed an instruction that the

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Opinion of the Court.

damages in such a case shall be diminished by the jury, and the words objected to were meant to give effect to, and not to qualify, the previous instruction.

The purpose of the provision in regard to contributory negligence in the Employers' Liability Act is to abrogate the common-law rule of complete exoneration of the carrier from liability in case of any negligence whatever on the part of the employé and to substitute therefor a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employé.

Where an instruction embodies several propositions of law, to some of which no objection can properly be taken, a general exception does not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition of law.

THE facts, which involve the liability of a railroad for personal injuries sustained by one of its employés while both were engaged in interstate commerce, and the construction of the provisions of the Employers' Liability Act of 1908 in regard to contributory negligence, are stated in the opinion.

*Mr. Roy B. Smith* and *Mr. John H. Holt*, with whom *Mr. Theodore W. Reath* was on the brief, for plaintiff in error.

*Mr. Bynum E. Hilton*, and *Mr. Thomas Lee Moore*, with whom *Mr. Harold J. Pack* and *Mr. Samuel B. Pack* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action against a railroad company to recover for personal injuries sustained by an employé while both were engaged in interstate commerce. The plaintiff secured a verdict and judgment in the Circuit Court, and the defendant sued out this direct writ of error, claiming



that the Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149, upon which the right of action was based, was repugnant to the Constitution of the United States. After the writ of error was allowed, our decision in *Second Employers' Liability Cases*, 223 U. S. 1, settled the constitutional questions in favor of the validity of the statute, but it is still necessary that we pass upon other questions presented in the case. *Michigan Central Railroad Company v. Vreeland*, 227 U. S. 59, 63.

The injury to the plaintiff occurred in the night time, in the month of February, in the railroad yards of the defendant at North Fork, West Virginia, while he was piloting a locomotive through several switches to a main track, where the locomotive was to be attached to an interstate train to assist in moving it over an upgrade in the direction of the next station. He carried a torch and was proceeding in advance of the locomotive to see whether the switches were in proper position, and, if not, to change them. Upon reaching the first switch, known as No. 3, he found it in proper position, signaled the engineer accordingly, and advanced along the track, between the rails, to a point near the next switch, known as No. 2, where the engine overtook him and inflicted serious injuries upon him, resulting in the loss of his right leg. He had not yet signaled to the engineer whether that switch was in proper position, and one of the questions controverted at the trial was, whether the engineer was negligent in attempting to pass over that switch without waiting for a signal. The evidence for the plaintiff was to the effect that it was the established custom in that yard for the engineer to await a signal from the pilot before proceeding over a switch and that the pilot was entitled to rely upon the engineer's conforming to that custom; while the evidence for the defendant was to the effect that by the settled custom the engineer, although required to await a signal before passing over the first

switch, was not required to await a signal before passing over the others, and that it was incumbent upon the pilot to govern himself accordingly. The evidence was likewise contradictory as to whether it was usual for pilots, in advancing before the engine, to walk between the rails, and also as to whether the conditions outside the track made it necessary to do so in the night time. But although the evidence was conflicting in these particulars, it established without any contradiction that it was the duty of the pilot to go ahead and see that the switches were lined up properly and, if not, to put them in position for the engine to pass, and that it was the duty of the engineer to keep control of his engine and to follow at a rate of not more than three or four miles an hour. Both the plaintiff and the engineer had been in this service for a long time and were familiar with the manner in which it was conducted and with all the conditions surrounding it. The plaintiff admitted that as he advanced from the first to the second switch, a distance of 130 feet, he made no attempt to see where the engine was, and the engineer substantially admitted that in covering that distance he made no attempt to see where the plaintiff was. Each justified his action or nonaction in this regard by what he described as the usage in that service.

In its charge to the jury the court, after saying that the mere occurrence of the injury was no evidence of negligence on the part of the defendant or its engineer and that the burden was on the plaintiff to establish such negligence by affirmative evidence, gave the following instructions at the defendant's request:

"The court further instructs the jury that if they shall believe from the evidence that the custom and practice in the North Fork yard was for the engineer to follow the fireman with his engine as he lined up the switches, and not to wait for a signal to proceed after the first switch, then it was not the duty of the engineer to wait for such

signal, and he had the right to proceed without any being given, and the fact that engineer Drawbond did approach switch No. 2, where the plaintiff was injured without any further signal from him is no evidence of negligence against defendant company.

"The court instructs the jury that if they shall believe from the evidence that it was the custom and practice in the North Fork yard for the fireman to line up the switches and for the engineer to follow him at a rate of three or four miles per hour without signals, or upon signal to proceed given at switch No. 3 [the first one], and if they shall further believe from the evidence that plaintiff was familiar with this custom and practice in said yard, and that at and before the accident which resulted in plaintiff's injury, engineer Drawbond was proceeding in accordance with this custom, then they are told that said engineer Drawbond had the right to act on the assumption and belief that the plaintiff in lining up the switches would take reasonable precaution for his own safety against the approaching engine."

The defendant complains that the court refused to say to the jury in that connection that the engineer was not required to keep any lookout for the plaintiff. We think the refusal was right. As before indicated, there was evidence tending to show that it was usual for the pilot to walk between the rails in advance of the locomotive, that the conditions outside the track made it necessary to do so in the night time, and that all this was known to the engineer. Whether this evidence was true was for the jury to determine, and if it was true it certainly could not be said as matter of law that the engineer was in the exercise of ordinary care, which was the controlling standard for him, if he made no effort to see whether the plaintiff was on the track and took no precautions for his protection. Upon that question the court rightly gave the following instruction:

"If the jury believes from the evidence that it was necessary or usual within the knowledge of John Drawbond [the engineer] for the plaintiff to walk on, along or over the tracks of the defendant company in front of the said engine while it was moving, in order to properly perform his duties of piloting said engine out of said yard, it was then the duty of the defendant company, through its engineer in charge of said engine, to use reasonable care and caution in the management of said engine and to keep such a lookout for the plaintiff as an ordinarily prudent and careful man would have done under the circumstances, to avoid running said engine, upon or over the plaintiff; and if the said engineer did not exercise such reasonable care and caution and that his failure so to do was the proximate cause of the accident, then they must find for the plaintiff."

Complaint is also made of the refusal to give an instruction requested by the defendant upon the subject of assumption of risk. But the instruction was couched in such general and sweeping terms that it was not calculated to give the jury an accurate understanding of the law upon that subject or to direct their attention to the particular phase of the case to which it was deemed applicable. Consequently, the refusal to give it was not error.

The declaration alleged that the plaintiff's damages amounted to \$20,000, and prayed judgment for that sum. One paragraph of the charge to the jury dealt at some length with the question of the measure of damages and contained the statement that, if the verdict was for the plaintiff, he should be awarded "such an amount of damages, not exceeding \$20,000 as" would compensate him for the injury. An exception was taken to this paragraph, without indicating wherein it was deemed objectionable, and complaint is now made that it erroneously conveyed to the jury an intimation that a finding that the plain-

tiff's damages amounted to \$20,000 was justified by the evidence. Looking at the entire paragraph we think it could not have been understood by the jury as conveying such an intimation, and that the words now criticised could only have been understood as marking a limit beyond which the jury could not go. Besides, if the defendant entertained any fear that the jury would be misled in that regard, it should, in fairness to the court and the plaintiff, have called special attention to those words in order that they might be so modified or explained as to leave no doubt of their purpose and meaning. *McDermott v. Severe*, 202 U. S. 600, 610.

The third section of the Employers' Liability Act declares, subject to a proviso not material here, that "the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé;" and in its charge the court dealt with the subject of contributory negligence as follows:

"Contributory negligence is the negligent act of a plaintiff, which concurring and coöperating with the negligent act of a defendant is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé. So, if you reach that point in your deliberations where you find it necessary to consider the defence of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence as compared with the negligence of the defendant. If the defendant relies upon the defence of contributory

negligence, the burden is upon it to establish that defence by a preponderance of the evidence."

An exception to this instruction was reserved, without suggesting any other objection to it than that the Employers' Liability Act was deemed unconstitutional. It is now criticised (a) because, instead of saying that, if the plaintiff was guilty of contributory negligence, the jury "must diminish the damages," it merely said that such negligence "goes by way of diminution of damages," and (b) because it prescribed a wrong rule for the diminution in that it directed or permitted it to be made upon a comparison of the plaintiff's negligence with that of the defendant. Both criticisms were advanced in the Circuit Court in support of a motion for a new trial which was overruled, the court stating that neither criticism had been suggested before.

We think there is no merit whatever in the first criticism. In one sentence the instruction plainly stated that the statute requires, where the plaintiff has been guilty of contributory negligence, that "the damages *shall* be diminished by the jury," and the statement in the next sentence that such negligence "goes by way of diminution of damages" was evidently intended as a mere repetition of the statutory requirement in somewhat different words. Its purpose was to give effect to what went before, not to qualify it, and it is not reasonable to believe that the jury could have thought otherwise.

The other criticism deserves more discussion. The thought which the instruction expressed and made plain was that, if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. This was twice said, each time in terms readily understood. But for the use in the second instance of the additional words "as compared with the negligence of the defendant" there would be no room for criticism.

Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, "as compared with the combined negligence of himself and the defendant." We say this because the statutory direction that the diminution shall be "in proportion to the amount of negligence attributable to such employé" means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employé. *Second Employers' Liability Cases*, 223 U. S. 1, 50.

Not improbably the mistake in the instruction was purely verbal and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant. But, be that as it may, the record discloses that full opportunity for presenting objections was afforded and that the one now pointed out was not made. We must therefore apply the rule that where an instruction embodies several propositions of law, to some of which no objection properly could be taken, a general exception to the entire instruction will not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein. *Baltimore & Potomac Railroad Co. v. Mackey*, 157 U. S. 72, 86; *McDermott v. Severe*, *supra*.

*Judgment affirmed.*